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## TAX VALUATION OF MINNESOTA IRON ORE

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### I. INTRODUCTION

A producing state's policies as to mine taxes and its tax valuation methods become focal points of legislative and legal controversy in an economy of full production or war preparedness. Business decisions whether to invest new capital in beneficiation of marginal Lake Superior iron ores or to undertake extensive exploration and development of foreign deposits are influenced by present and prospective tax burdens.<sup>1</sup> While questions of tax rates and incidence of mine taxation are left to the legislature under the Minnesota Constitution,<sup>2</sup> procedural problems of valuation and assessment center about four issues which should properly engage the attention of courts: the structure and constitutionality of the mineral valuation statutes; standards and methods of valuation as administratively applied; remedies available for allegedly incorrect assessments; and the availability of judicial review of valuations.

Of the economic interests involved in Minnesota tax controver-

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1. See Fortune, Dec. 1948, p. 115 for a major promotion of foreign iron ores, viz., Labrador ores to be hauled 350 miles to the St. Lawrence and then through the St. Lawrence to inland mills; U. S. Steel Co. has announced the Cerro Bolivar find in Venezuela from which 10 to 15 million tons a year will be shipped to the United States. Lippett, *Journal of Metals & Mining Engineering* (Feb., 1950).

2. Art. IX, § 1, Minn. Const., before amendment in 1906 read: "... all taxes . . . shall be as nearly equal as may be." In its present form Art. IX, § 1, places little or no limitation on the power of the legislature to select the method, subject, or rates of taxation: "Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, . . ." Cf. *Winget v. Holm*, 187 Minn. 78, 86, 244 N. W. 331, 334 (1932); *State ex rel. Oliver Iron Mining Co. v. Ely*, 129 Minn. 40, 46, 151 N. W. 545 (1915); *Mutual Benefit Ins. Co. v. County*, 104 Minn. 179, 180-81, 116 N. W. 572, 573 (1908).

Art. IX, § 1A requires an occupation tax to be levied on iron ore mining based upon valuation of iron ore mined or produced.

sies, attention in litigation is usually focussed on the state, represented by the Commissioner of Taxation;<sup>3</sup> and the operating mining companies, who are challenging the method of taxation or valuation procedures. No less important are the municipalities:<sup>4</sup> cities, counties, school districts, towns and villages of the iron range which receive their principal revenue from mill rate levies based on valuations established by the state. In the background are steel corporations which own, lease, or control the Minnesota iron resources and the operating mining corporations; their interests are in the continued future supply, the interstate transportation, and basically low cost of the ore for their finished products.<sup>5</sup> Because much of the mineral property is owned in fee by persons who in turn lease mineral and surface rights to the operating mining companies,<sup>6</sup> the lessors are concerned with effects of high state taxes in depressing the royalty rate received<sup>7</sup> or increasing the number of leases terminated in periods of low demand for steel and iron ore. These local fee owners, as individual entrepreneurs, may also carry the chief economic burden of new exploration for added reserves of iron ore.<sup>8</sup> Finally, the railroads, both publicly held and private, have a substantial stake in the revenues originating in the 100-mile hauls from mine to lake ports.

While there is slight authoritative information measuring the economic effect of Minnesota taxation on development of new mines or installation of beneficiation plants to utilize low grade ore,<sup>9</sup>

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3. See 1 Minn. Stat. §§ 270.06, 270.07 (1945).

4. See Report, Interim Legislative Commission on Iron Ore Taxation, 93 (Minnesota, 1941).

5. See TNEC, 18 Hearings, Iron and Steel (Iron Ore) 10362-64 (1939). Testimony brings out the relation of the control of ore properties to the price of finished steel products and to taxes in a period of low ore demand.

6. *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503 (1917). Royalty contracts for the Lake Superior District are not mere contracts for the sale of ore from the land but are true leases without impeachment for waste. Royalties are rentals, as for farm land, and are current income from the land. Normally, the lease provides for the lessee operating company to pay the cost of taxes on the property for the lessor. But *cf.* the effect and incidence of the royalty tax, which may reach minimum royalties paid under the lease although no mining is done for the year. For an example of the terms of such a lease see *Day v. Inland Steel Co.*, 185 Minn. 53, 239 N. W. 776 (1931).

7. Transcript of Record, p. 17 (No. 336), *Lake Superior Iron Mines v. Lord*, 271 U. S. 577 (1926) indicates that of an average of \$16 millions yearly royalty, nine millions were received by fee owners within the state, and the balance by non-residents. There is little reason to believe the proportion of resident ownership has increased since then.

8. Thus in 1948, out of 89 exploration licenses only 3 were granted to large operating companies (Butler Bros. 2, Oliver Iron Mining Co. 1). *St. Paul Dispatch*, Dec. 22, 1948, p. 21.

9. *Cf.* Report, *supra* note 4, at 77-84. But *cf.* J. G. White Engineering Co., II Economic Analysis of Minnesota, 87-138 (1945) (original report).

the state and local tax burden of the industry is substantial<sup>10</sup> in terms of total taxes paid and by comparison to taxes levied on iron ore by other states in the Lake Superior District. An analysis of state and local direct taxes since 1914 shows a total burden of more than \$500,000,000 of state and local taxes on the one industry in Minnesota. Comparative studies show that while Minnesota consumed from \$.31 a ton to \$.735 a ton in taxes, Michigan, the other major iron ore producing state, taxed from \$.17 to \$1.17 a ton; or an average of 21%, as compared to 6.5% of the sale price used for valuation, respectively.<sup>11</sup> About 51% of the mine tax burden is imposed by local units taxing to the maximum mill rate the property valuations set by the state. Some of this local expense would exist if these were company owned towns; and the tax does contribute to better living conditions in remote areas, necessary to keep labor. Much of the economic objection raised to such high total state taxation has been to indicate large reserves of ore available in other countries as against diminishing supplies of high grade ores in the Lake Superior District.<sup>12</sup> Until

10. Four taxes reach the Minnesota mining industry directly: (1) *Classified ad valorem real and personal property tax*. 1 Minn. Stat. § 273.13 (1945). Iron ore is classified at 50% of "full and true value," business property at 40%, and agricultural real estate at 33⅓%. (2) *Mining occupation tax*. 1 Minn. Stat. § 298.01 (1945). A privilege or excise tax on tonnage actually severed based on the "valuation" of the ore mined each year. The 1950 rate is 12% on such valuation; it was 6% in 1937. (3) *A Royalty tax*. 1 Minn. Stat. § 299.01 (1945). The 1950 rate is 12% of the royalty paid the lessor; in 1937 it was 6%. The tax has been characterized as a privilege tax, *Lake Superior Consolidated Iron Mines v. Lord*, 271 U. S. 577 (1926); and as a property tax, *State ex rel. Oliver Iron Mining Co. v. Armonson*, 181 Minn. 221, 232 N. W. 35 (1930); *Marble v. Oliver Iron Mining Co.*, 172 Minn. 263, 215 N. W. 71 (1927). (4) *The Taconite* (low grade iron ore) *tonnage tax*. 1 Minn. Stat. §§ 298.24, 298.25 (1945). The 1950 rate is five cents a ton upon the concentrate shipped, plus 1/10 of one per cent per unit of iron over a standard minimum iron content. This tax is in lieu of the ad valorem property tax on the ore itself or the mining plant. This tax is in addition to the occupation tax and in addition to the royalty tax. Although the occupation tax is in lieu of state income tax, it is claimed that an 11% occupation tax rate is the equivalent to a 23% income tax rate based on net income which exceeds the income tax imposed on other industries. *But see* J. G. White Engineering Corp., II Economic Analysis 136-37 (1945) (original report).

11. Minn. Dep't Tax., 21st Biennial Report, 55-56 (1948); Report, *supra* note 4, at 76; J. G. White Engineering Corp., II Economic Analysis of Minnesota, 128 (1945) (original report).

12. *But cf.* TNEC, *supra* note 5, at 10387-88, in which it was denied there was in 1939 a problem of conservation of a natural resource. Estimate in 1946 of the Minnesota Department of Taxation show reserves of 1,206,000,000 tons, or about 63% of the estimate made in 1910 of 1,905,000,000 for the Lake Superior District. Conservative independent estimates as of May 1, 1945, not made for tax purposes, showed 1,572,000,000 tons of normal shipping ore in Minnesota alone; and about 2 billion tons for the whole Lake Superior District. Direct testimony, I. C. C. Docket 29502 (June 30, 1947). These estimates did not include the low-grade taconite and magnetic

very recently, however, few low grade ore beneficiation plants were established, unless under auspices of the state or small entrepreneurs. Little or no outside capital came in to explore for or develop new mines or reserves after the expansion during the First World War.<sup>13</sup>

## II. JURISDICTION TO TAX—INCLUSION OF EXTRA-TERRITORIAL INCREMENTS OF VALUE IN PROPERTY TAX VALUATIONS

With the burden still on the taxpayer to convince federal courts that objection to a particular tax on mineral resources destined for interstate commerce is more than a plea for individual exemption from operation of the state's revenue systems, and with an immensely technical set of commerce clause distinctions, the state courts are increasingly important moderators to protect the legislature from itself and shield non-resident owners or investors from discrimination or unfavorable administration of tax laws.<sup>14</sup> Recent cases show reluctance by the federal courts to invalidate taxes which have been sustained by state courts,<sup>15</sup> so the place to win, if at all, is before the state courts.<sup>16</sup> The equal protection clause of the 14th Amendment and the Minnesota uniformity provision offer scant protection against the singling out of mineral resources for unusual burdens of multiple taxation.<sup>17</sup> The due process clause, however, may have several points of leverage: the question of whether the purpose for which the property tax is levied is properly a "public purpose"; whether the taxing state has jurisdiction to tax the values selected in view of the domicile of the owner and kind of property; and the multiple questions of procedural due process in valuation, assessment, and collection of the tax.<sup>18</sup>

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ores. The average shipping rate from Minnesota has been below 50 to 60 million tons a year.

13. Report, *supra* note 4, at 78; Minn. Tax Comm'n, 11th Biennial Report, 140-41 (1928). J. G. White Engineering Corp., II Economic Analysis, 134, 138 (1945) (original report).

14. See Powell, *Current Current of the Commerce Clause and State Taxation*, Proc. Nat. Tax Conf. 1, 38 (1940); Powell, *Supreme Court Condonations and Condemnations of Discriminatory State Taxation*, 12 Va. L. Rev. 441, 562 (1926).

15. *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80 (1948); *Nashville Ry. v. Browning*, 310 U. S. 362 (1940); *Illinois Cent. Ry. v. Minn.*, 309 U. S. 157 (1940).

16. See text commencing page 423 for the procedural difficulties of placing state tax cases in Federal Courts.

17. *E.g.*, *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 179 (1923); *Lake Superior Iron Mines v. Lord*, 271 U. S. 577, 581 (1926); *Lyons v. Spaeth*, 220 Minn. 563, 567, 20 N. W. 2d 481, 484 (1945).

18. The procedural questions are discussed in text to note 172 *et seq. infra*.

Few cases have explored the contention that where unusual amounts of money are raised by taxes on a special class of persons the legislature has exceeded its power to tax because the money raised has no clear relation to those subjected to the special burden.<sup>19</sup> The cases dealing with so-called "special assessments" are legion.<sup>20</sup> But unless tax exemptions or special rebate provisions are involved,<sup>21</sup> it is usually assumed the general revenue purpose is closely enough related to the source of taxation to be a proper purpose. Now, if the incidence of taxation is shown in fact to rest upon values created by industry lying entirely outside the state, and because of capital invested entirely away from the protection of the taxing state, then the "public purpose" of a tax on extra-territorial values existing due to integration may be dangerously remote from the source of tax. There can be no representation of the extraterritorial interests in the taxing state's legislature; no chance exists for election of persons to administer the funds so raised by any electorate in size proportionate to the money contributed or numerically interested and dependent on the values taxed; and in the case of natural resources so taxed, there is no chance of future benefit to the extraterritorial enterprises thus levied upon, once the resources are exhausted.

Closely related is the question of jurisdiction to tax, which has been raised frequently in connection with capital levies on intangibles, inheritance taxes, apportioned excise or sales taxes, and corporate franchise taxes.<sup>22</sup> Due process limitations on jurisdiction to tax have not been argued or decided directly in the iron ore ad valorem tax cases, other than by inference in discussion

19. See Powell, *Due Process Tests of State Taxation, 1922-1925*, 74 U. of Pa. L. Rev. 423, 436 (1926).

20. *Ibid.*

21. *Remoteness in Time*: *Cole v. LaGrange*, 113 U. S. 1 (1884); *State ex rel. Owen v. Donald*, 160 Wis. 20, 151 N. W. 331 (1913); see *Green v. Frazier*, 253 U. S. 233, 238 (1920); *Remoteness of Benefit*: *Parkersberg v. Brown*, 106 U. S. 487, 500 (1882); *Lowell v. Boston*, 111 Mass. 454 (1873); *Michigan Sugar Co. v. Auditor General*, 124 Mich. 674, 83 N. W. 625 (1900); *State v. Lafayette Fire Ins. Co.*, 134 La. 78, 63 So. 630 (1913); see *McAllister, Public Purpose in Taxation*, 18 Calif. L. Rev. 137, 241 (1930); 106 A. L. R. 906 (1937).

22. *Harding, Double Taxation of Property and Income* §§ 11, 18 20 (1933); Powell, *Due Process Tests of State Taxation, 1922-1925*, 74 U. of Pa. L. Rev. 423, 426 (1926). Three constitutional provisions may be involved: the due process clause, the equal protection clause (both under the 14th Amendment), and the full faith and credit clause (Art. IV) (although few tax cases have explored the conflicts of laws question of the power of the state of domicile of a corporation to tax as excluding other states as a matter of full faith and credit). Cf. *Scott, Business Jurisdiction over Non-Residents Doing Business Within a State*, 32 Harv. L. Rev. 871 (1919). See *Beale, Jurisdiction to Tax*, 32 Harv. L. Rev. 587, 594 (1919).

of Lake Erie price as the basis for capitalized anticipated yield valuation.<sup>23</sup> Both as to the question of reaching a proper valuation and as to the power of the state to levy a property tax in terms of the "going concern" value of the mining companies, jurisdiction to tax would seem a crucial issue before either state or federal courts.<sup>24</sup>

Assuming the mining corporation to be a Minnesota corporation, property and occupation taxes of the domiciliary state which is also the actual "situs" of the property would seem at first sight not open to challenge.<sup>25</sup> Upon closer analysis, there is difficulty in deciding whether "the property" is the iron ore itself unsevered, the severed iron ore in cars en route to lake vessels, or iron ore at any and all points from the pits to the blast furnace, part of a continuous stream of tonnage.<sup>26</sup> There is the further difficulty that the value selected as the value of ore at the mine for ad valorem property tax and occupation tax purposes represents an artificial price which in no sense always reflects a bargained market value.

Where the operating mining company taxed is not domiciled in Minnesota but is a New Jersey or Delaware corporation producing from mines in two or more states, as is often the case, the value of iron ore taxed at the Lake Erie price basis includes increments of value added by the integrated ownership of steel plants, systems of railroads and lake vessels, and an organized iron ore and finished steel marketing network, all of which may exaggerate heavily the value of the mines to the investor in such an

23. *State v. Oliver Iron Mining Co.*, 198 Minn. 395, 279 N. W. 614 (1936); *Village of Aurora v. Comm'r of Taxation*, 217 Minn. 64, 14 N. W. 2d 292 (1933). *Cf. Sunday Lake Iron Co. v. Town of Wakefield*, 247 U. S. 350 (1918); *State Tax Comm'r v. Magma Copper Co.*, 41 Ariz. 97, 15 P. 2d 961 (1932) discussed in note 43 and following, *infra*.

24. *Cf. Louisville & J. Ferry Co. v. Ky.*, 188 U. S. 385 (1903); *Union Refrigerator Transit Co. v. Ky.*, 199 U. S. 194 (1905); *Commonwealth v. West India Oil Refining Co.*, 138 Ky. 828, 129 S. W. 301 (1910); *State ex rel. Atty. Gen. v. Lion Oil Refining Co.*, 171 Ark. 209, 284 S. W. 33 (1926); *Standard Oil Co. v. Howe*, 257 Fed. 481 (9th Cir. 1919); *Franklin v. Nevada-Calif. Power Co.*, 264 Fed. 643 (9th Cir. 1920); *Wheeling Steel v. Glander*, 337 U. S. 562 (1949).

25. *New York ex rel. N. Y. Central Ry. v. Miller*, 202 U. S. 584 (1906); *Southern Pac. Ry. v. Ky.*, 222 U. S. 63 (1911). *But cf. Union Refrigerator Transit Co. v. Ky.*, 199 U. S. 194 (1905); *Maxwell v. Bugbee*, 250 U. S. 525 (1919); *Schwab v. Richardson*, 263 U. S. 88 (1923). The Supreme Court may adopt the state court's characterization of the tax. *N. Y. ex rel. Clyde v. Gilchrist*, 262 U. S. 94 (1923).

26. In measuring wealth of the corporate person domiciled in the state, the state is more restricted in taxing the value of chattels or personal property which has acquired a situs elsewhere in the imposition of a property tax or an occupation tax measured by the privilege exercised wholly within the state. *E.g., Union Refrigerator Transit Co. v. Ky.*, 199 U. S. 194 (1905); *Delaware, L. & W. Ry. v. Pa.*, 198 U. S. 341 (1905). See note 31 *infra*.

integrated enterprise. If the tax is in reality upon the value of transportation systems, furnaces, and a marketing organization, can the state be said to have exceeded its jurisdiction to tax?

The incidence of the tax, whether ad valorem or occupation tax, and the methods of appraisal become crucial to the question of power to tax. Analysis of the capitalized future net profits method of mine valuation now in use shows that extraterritorial values are in fact included in values taxed as being at the mine in Minnesota. Then, this being the case, the nature of the occupation and royalty taxes, whether characterized as a property tax or simply as a tax on the privilege of mining, is relevant to the state's power to impose the tax: If it is a privilege tax or excise there is authority to the effect that a tax by state *A* on a privilege exercised in state *A* by a foreign corporation licensed to do business there may be levied although the tax reaches intangibles or property sent out of state.<sup>27</sup> On the other hand, in the case of an ad valorem property tax, due process requires the tangible property taxed to have "situs" within the territorial jurisdiction of the taxing state, regardless of the domicile of the owner.<sup>28</sup> And if a property tax reaches intangible property, the tax ought to apply only at the "situs" where such intangibles are permanently located, employed, and protected.<sup>29</sup> The underlying reason for denial of power to levy a property tax on property outside the territorial jurisdiction of the taxing state is an assumption that the state, in return for the power of taxation, renders services in protection of property, enhancement of the value through improvements, and provision for public conveniences; therefore, if the taxing state cannot render these services, the taxation of such property, where it is in the jurisdiction of another state, is an extortion rather than a tax.<sup>30</sup>

27. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940) (sustaining a privilege tax as a deferred levy on corporate income derived in Wisconsin).

28. *Union Refrigerator Transit Co. v. Ky.*, 199 U. S. 194 (1905) (domicile in the taxing state). *Cf.* note 24 *supra* (domicile outside the taxing state). Then what effect will the doctrine of "commercial domicile" have on this distinction? *Cf.* *Wheeling Steel Corp. v. Fox*, 298 U. S. 193 (1936); *First Bank Stock Corp. v. Minn.*, 301 U. S. 234 (1937); *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80 (1948) *semble*; *Wheeling Steel Co. v. Glander*, 337 U. S. 562 (1949) (intangibles, equal protection clause).

29. *New Orleans v. Stempel*, 175 U. S. 309 (1899); *Bristol v. Washington County*, 177 U. S. 133 (1900); *State Board of Assessors v. Comptoir National d'Escompte de Paris*, 191 U. S. 388 (1903) (all cases involving the business situs of tangible evidence of credits); *cf.* *Wheeling Steel Co. v. Glander*, 337 U. S. 562 (1949). The question is open whether the states of "commercial domicile" of the corporation and the domicile of incorporation and the "business situs" of intangibles can tax the intangibles.

30. *See Union Refrigerator Transit Co. v. Ky.*, 199 U. S. 194, 202 (1905).



The precise question of the extent to which the state of situs of natural resources has jurisdiction to include in the assessed values for a property tax the intangible values created by the existence of capital structures and organizations in other states essential to utilize the natural resources, has not been adjudicated in any cases coming to the attention of the writer.<sup>31</sup> In *Hopc Natural Gas Co. v. Hall*,<sup>32</sup> an annual privilege tax on gross proceeds of sales, not an ad valorem property tax, was sustained against objections by a foreign corporation that the state was taxing interstate commerce itself, and that values contributed by the pipe line as a whole, and not merely those at the well, were included in the appraisal;<sup>33</sup> the due process question was not directly raised nor adjudicated; the state court included the extraterritorial values as the value at the well. In *City of Galveston v. American National Ins. Co.*,<sup>34</sup> an intermediate state court required that the true value of the foreign realty owned by a corporation be deducted from assessed value of personal property in total assets for purposes of a personal property tax. *Cudahy Packing Co. v. Minnesota*<sup>35</sup> involved the Minnesota constitutional provision for a gross earnings tax on railroads in lieu of all property taxes; there it was held proper to consider intangible property above cash values of the cars incident to the use of a fleet of refrigerator cars owned by

31. Two state decisions are close to the point; both are cited as involving the refusal of the courts to apply the "unit rule" to properties other than public utilities using mileage ratios. In reality, both cases involve refusal of the state court to use a capitalized future earnings method of valuation for property tax valuations. *American Bauxite Co. v. Bd. of Equalization*, 119 Ark. 362, 177 S. W. 1151 (1915); *State ex rel. Atty. Gen. v. Lion Oil Refining Co.*, 171 Ark. 209, 284 S. W. 33 (1926); cf. *Standard Oil Co. v. Howe*, 257 Fed. 481 (9th Cir. 1919); *Franklin v. Nevada-Calif. Power Co.*, 264 Fed. 643 (9th Cir. 1920); *Rowland v. City of Tyler*, 5 S. W. 2d 756 (1928); *Puget Sound Power & Light Co. v. King County*, 10 Wash. 2d 424, 116 P. 2d 827 (1941). See 2 Cooley, *Taxation* § 811 (4th ed. 1924).

32. 274 U. S. 284 (1927). This case raised, but did not adjudicate, the questions of integrated values and extraterritorial values above sale price at the well as a due process question, and under the commerce clause. See Powell, *More Ado About Gross Receipts Taxes*, 60 Harv. L. Rev. 501, 509-11 (1947). The record, p. 258, indicates the West Virginia court below limited the tax statute to the value of the natural gas within the state and before it entered interstate commerce by a revised final decree. On appeal, the Supreme Court seems to have accepted this limitation, although appellants argued the jurisdiction to tax question by analogy to the cases dealing with corporations engaged in interstate commerce.

33. Defendant below admitted value of the gas produced was augmented by the pipe line system but contended it was enhanced prior to transportation. Plaintiff contended there was a market value at the point of production as distinct from the place of sale. Brief for Appellant, p. 31.

34. 14 S. W. 2d 897 (Tex. Civ. App. 1929).

35. 246 U. S. 450 (1918). Cf. *Illinois Cent. Ry. v. Minn.*, 309 U. S. 157 (1940).

a foreign corporation used in interstate commerce and only occasionally brought within the state. Significantly the Minnesota court had held the gross earnings tax to be a property tax intended to reach tangible and intangible values connected with them.<sup>36</sup> And the Supreme Court accepted this view of the tax, considering the gross earnings tax as a measure of the tax on property. But the favorable position of the railroads in Minnesota under the constitutional exemption from all other taxes should be contrasted with that of the mining industry of that state which bears a structure of multiple taxes. This railroad gross earnings tax situation and the unit rule should also be distinguished from taxation of intangible values wholly outside the state and which never enter the state. A minimum of state contacts with: the situs of the place of execution of contracts for sale of ore, the ore carrying vessels, the blast furnaces, and the steel marketing organization, seems to give a producing state little if any justification to tax some of the values which may subsequently be heavily taxed by the state of situs.

Use of a valuation formula which included extraterritorial values for ad valorem property tax assessments has been held invalid in the case of a foreign oil company's retailing property,<sup>37</sup> bauxite mines,<sup>38</sup> oil and gas wells,<sup>39</sup> power production facilities,<sup>40</sup> steam plants,<sup>41</sup> and tailings deposits.<sup>42</sup> But more often the validity of a capitalized earnings formula which included extraterritorial value has been assumed as matter of necessity,<sup>43</sup> and no express

36. *State v. Great Northern Ry.*, 106 Minn. 303, 119 N. W. 202 (1908); *cf. State v. Wells Fargo & Co.*, 146 Minn. 444, 179 N. W. 221 (1920). (Court accepted use of capitalized net earnings as a measure of intangible value of the corp.).

37. *Standard Oil Co. v. Howe*, 257 Fed. 481 (9th Cir. 1919) (capitalized earnings formula could not be used, where it included wells and sales made in California for purposes of real property assessments in Arizona levied against the California corporation).

38. *American Bauxite Co. v. Bd. of Equalization*, 119 Ark. 362, 177 S. W. 1151 (1915). See note 31 *supra*.

39. *State ex rel. Atty. Gen. v. Lion Oil Refining Co.*, 171 Ark. 209, 284 S. W. 33 (1926). See note 31 *supra*.

40. *Franklin v. Nevada-Calif. Power Co.*, 264 Fed. 643 (9th Cir. 1920).

41. *Puget Sound Power and Light Co. v. King County*, 10 Wash. 2d 424, 16 P. 2d 827 (1941).

42. *South Utah Mines & Smelters v. Beaver County*, 262 U. S. 325 (1923) (dictum that use of capitalized earnings method may be necessary).

43. *Ibid*; *Sunday Lake Iron Co. v. Town of Wakefield*, 247 U. S. 350 (1918) (by implication and on record below); *Cleveland Cliffs Iron Co. v. Republic Township*, 196 Mich. 189, 163 N. W. 90 (1917), *dismissed*, 248 U. S. 592 (1918) (at request of plaintiff in error); *State Tax Comm'n v. Magma Copper Co.*, 41 Ariz. 97, 15 P. 2d 961 (1932). None of these cases analyze or give reasons for adoption of the method. Mining companies concede the method. *State Tax Comm'n v. Phelps Dodge Copper Corp.*, 62 Ariz. 320, 157 P. 2d 693 (1945) (follows the *Magma Copper* case *supra*, rejecting use of past profits by the tax commission).

consideration given to the state's jurisdiction over factors used in the formula. The question of domicile of the corporation taxed and valued has not been discussed in the cases sustaining the valuations.

It is submitted that two considerations should influence a court's decision on the extent to which the non-domiciliary state has power to include extraterritorial intangible values created by going concern capital plant and organization in valuations for purposes of the classified ad valorem property tax.<sup>44</sup> Fairness would suggest a weighing of the number and the importance of the territorial contacts<sup>45</sup> the particular industry has with the taxing state, including the taxing unit's need for revenue from this source, the protection enjoyed, ultimate profits derived strictly within its territorial limits, research or geological facilities provided, and persons employed by or dependent on the mining community. The result to be reached then should be conditioned by the needs of a commercial and industrial society dependent on abundant, cheap sources of raw materials freely interchanged throughout the nation.

### III. SELECTION AND ADMINISTRATION OF VALUATION METHODS—MINNESOTA

#### A. Concepts of Value—Wasting Asset Valuation

The early common law provided little precedent for definitions of "value" for tax purposes;<sup>46</sup> there was a debate over the meaning of "price" or of "value" in the statutes, chiefly relating to the law of damages, but it became immaterial which word was used after 1600. The cases prior to 1600 are unrevealing as to what valuation methods, if any, were used in tax disputes with the Crown; and less revealing concerning either tax valuations or the measure of damages to be used in situations involving mines and mineral property.<sup>47</sup> Two principles of valuation of property for tax purposes developed in the 17th and 18th centuries: that the

44. No opinion is expressed here whether those same considerations should govern a privilege, occupation, or severance franchise tax based upon tonnage rather than upon a capitalized future earnings test of value. In theory, the power of the state to tax should be subject to similar limitations; but due to the varying incidence of the taxes which have been important in the results reached by the courts, each statutory provision would be subject to special analysis in view of the effect on similar taxes on other businesses and the revenues of the taxing units. Cf. *Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U. S. 412 (1937).

45. Cf. *Wheeling Steel Corp. v. Fox*, 298 U. S. 193 (1936).

46. Matthews, *Valuation of Property in the Early Common Law*, 35 Harv. L. Rev. 15 (1921).

47. *Id.* at 28.

object in valuation should be to reach the fair "annual rental" of the property as it stood on the date of valuation, unencumbered or unaffected by outstanding leases and irrespective of the fact that the lease carried greater or lesser rent than the fair rental value of the property; and that "annual rental" meant the net income to be fairly expected from year to year, not the greatest or smallest income of the year for which the tax was levied.

The Roman law, which seems to have been ignored by the early common law courts, made distinctions as to kinds of value which are similar to those recognized in economic theory today. These definitions form a useful framework upon which to analyze the confusion existing about statutory definitions of value and the results reached by courts in trying to reconcile the statutes with administratively conceived methods of assessment. The Romans considered four kinds of value:<sup>48</sup> "Market value"; "ordinary or general value"; "value to the owner"; and "sentimental value." It is perhaps significant that the idea of "market value" was seldom used except as to chattels traded regularly and contained no fictitious assumption of a ready buyer or artificial market. Price value, or what the property would bring if sold or rented, apparently was used as "ordinary value." This was the usual basis of appraisal, having the useful function of reducing recoveries, and it appears in the inheritance tax cases. In compensation awards for damage suits, "value to the owner" was the chief measure of damages; namely, the value which property had by reason of its peculiar qualities or due to the special circumstance of some particular person plaintiff, so that it was worth more to him than to the world at large. The selection of a meaning of "value" depended in part upon the nature of the legal action and remedy provided, as well as the quantitative result which the definition seemed to produce. A modern authority, after a monumental survey of the field, reaches somewhat similar conclusions that the definition of value used by courts varies widely with the purpose:<sup>49</sup>

"As long as common law and statute law persist in using the term "value" as a legal jack-of-all trades, judges are forced, willy-nilly to reject the precedent of Humpty Dumpty: 'When I use a word it means what I choose it to mean . . . neither more nor less.' . . . That is to say, one must . . . address one's self to the question, what meaning should here be assigned to the term in view of the interest of the legislature that used it, and in the light of the

48. Matthews, *Valuation of Property in the Roman Law*, 34 Harv. L. Rev. 229 (1921).

49. 2 Bonbright, *Valuation of Property* 1166-67 (1937).

probable social consequences flowing from the adoption of one definition rather than another?"

The first mention in English reports of the principle of valuation of mineral deposits for purposes of taxation in more recent times seems to be in *Rex v. Richardson*,<sup>50</sup> which held that lead mines were not rateable for the poor under 43 Eliz., C. 2 (1601) since the risk of mining was too great and the mention only of coal mines in the statute was meant to exclude all others, although in fact the statute was ambiguous. *Rowes v. Gells*<sup>51</sup> placed judicial exemption of lead mines squarely on the risk involved, and the view that to charge both the lessor and the lessee would be a double tax.<sup>52</sup> But the lessee of a coal mine, the one kind of mine mentioned in the statute, was rateable only on the royalty he paid.<sup>53</sup> In *Rex v. Bedworth*,<sup>54</sup> decided in 1807, it was held that the lessee of a coal mine which ceased to be worked was no longer "ratable" for the poor tax, although he was still bound to pay rent reserved to the landlord. The general rule of valuation to the owner-operator for tax purposes was the value of the rent, or what we call royalty, that amount a hypothetical tenant from year to year would give for the occupation of the mine.<sup>55</sup> The test as to an owner-operator was not what a tenant would give in the preceding year, but what a hypothetical tenant would give in the coming year.<sup>56</sup> The value of the property to the lessee operator for poor tax was the amount of coal worked out in the previous year times the royalty rate paid. These principles of property tax valuation are repeated in the English cases down to the present time.<sup>57</sup>

Although it appears iron mines were exempt from assessment by judicial decision and by statute,<sup>58</sup> the surface buildings, equip-

50. 3 Burr. 1341, 97 Eng. Rep. 864 (K.B. 1762).

51. 2 Cowp. 451, 98 Eng. Rep. 1182 (K.B. 1776).

52. Citing *Rex v. Vandewell*, 2 Burr. 991, 97 Eng. Rep. 667 (K.B. 1760).

53. *Rex v. Parrot*, 5 T. R. 593, 101 Eng. Rep. 332 (K.B. 1794).

54. 8 East 387 (K.B. 1807).

55. Cf. *Rex v. Attwood*, 6 B. & C. 277, 108 Eng. Rep. 455 (K.B. 1827).

56. *Ibid.*

57. *Denaby & Cadeby Colliery Co. v. Doncaster Union*, 62 J. P. 343, 78 L. T. 388, 14 L. T. R. 347 (Q.B. 1898) (evidence of the probable future life and working value of the mine received as relevant to probable lease value for coming year; evidence of costs properly received to arrive at net annual value); *Watson v. Charlesworth* [1905] 1 K. B. 74, *aff'd*, *Charlesworth v. Watson* [1906] AC 14; *Farnham Flint, Gravel & Sand Co. v. Farnham Union*, 1 K. B. 272, 17 L. T. R. 150 (1901) (follows *Rex v. Bedworth* 8 East 387 (K.B. 1807) in assessment for occupations tax).

58. *Morgan v. Crawshay*, L. R. 5 H. L. 304, 5 Eng. & Irish App. Cases 304 (1871); *Guest v. East Dean*, L. R. 7 Q. B. 334 (1872) (both cases construing 43 Eliz., c. 2 (1601). Cf. Rating Act, 37 & 38 Vict., c. 54, §§ 7, 13 (1874); Rating and Valuation Act, 1925, 15 & 16 Geo. V, c. 90, § 22.

ment, and machinery thereof were assessed separately and valued in the same manner; that is, by the rent or royalty that would be paid in the coming year by a tenant.<sup>59</sup> There seems to be no idea of value to a particular owner in this method of assessment but rather something akin to the Roman "ordinary value." No principle of what the mining property would bring if sold, or "fair market value" notion, is suggested in the English cases, since it is apparently assumed the chief utility of the mineral property will be by lease to an operator, and that the long term value was too speculative.

Very few tax cases appear in early American reports involving mineral valuation questions,<sup>60</sup> and these seem to accept no settled methods of valuation. Until 1912, there was no principal method of valuation in the Lake Superior district for the ad valorem property tax with the exception of a tonnage tax in lieu of all other taxes<sup>61</sup> for a period of ten years, between 1885 and 1896. The record in one of the first cases to come before the United States Supreme Court on iron mine tax valuations,<sup>62</sup> shows the mining company arguing at trial in 1913 that the then proper method of valuation was the royalty that would be paid to a fee owner to induce him to part with the ore in the ground, with some bonus for development and opening the mine.<sup>63</sup> The sale price of the property standard seems to have been used by the Minnesota Tax Commission,<sup>64</sup> although it classified the mines by grade of ore and whether the property was active, for purpose of applying a hypothetical single rate to each class of ore. At first, the Minnesota Commission used the estimates of the "ore in sight," furnished by the mining companies,

59. *Guest v. East Dean*, L. R. 7 Q. B. 334 (1872).

60. *Robinson v. Allegheny County*, 7 Pa. (7 Barr) 161 (1847); *State v. Moore*, 12 Cal. 56 (1859); *Garell v. Murphy*, 1 Leg. Gaz. Rep. 495 (Pa. 1871); *Allegheny Comm'rs v. Union Mining Co.*, 61 Md. 545 (1884).

61. Minn. Gen. Stat. §§ 1689-91 (1894). This tonnage tax of one cent per ton on all ore mined and shipped was held invalid under the then existing Art. IX, § 1, uniformity and equality clause, without extended discussion by Mitchell, J., when an urban real estate company made an affirmative defense to its property tax that mineral property had been omitted from the assessment. *State v. Lakeside Land Co.*, 71 Minn. 283, 73 N. W. 970 (1898).

62. *Sunday Lake Iron Co. v. Town of Wakefield*, 247 U. S. 350 (1918). For further discussion of this case see text at note 77 *infra*.

63. Transcript of Record, pp. 19, 20, *Sunday Lake Iron Co. v. Town of Wakefield*, 247 U. S. 350 (1918). The record also indicates that this method of valuation led to assertions by the tax authorities that the largest possible royalty payable in the area would then properly be the measure of the true value of the mine to the lessee. *Id.* at 104-10. Note that the mine managers apparently exercised considerable influence over the local assessors to keep the mine valuation low, although other local property valuations were even lower. *Id.* at 74 *et seq.*

64. Minn. Tax Comm'n, First Biennial Report, 117-122 (1907).

as determinative of the value. The Michigan Tax Commission, on the other hand, had at one time or another also considered additional factors: quotations of capital stock on the markets, gross and net income, recent sales of property, and ore production,<sup>65</sup> but admitted serious difficulty in the weight to be attached to any one. The difficulty with a royalty method of valuation was that the leases were frequently secret, and the value of the property to the lessee usually increased as the mine passed beyond the speculative stages. In addition to these shortcomings, the royalty method had the fatal defect of not raising enough money to meet the rising costs of local and state government. But it should be observed the methods in use until 1911 confined the property tax assessments to incidents within the territorial limits of the state, by using a basic theory of the rental value of the property, or its sale value where sufficient transactions were available.

The first litigated attempt at a systematic engineering valuation of iron properties for ad valorem tax purposes was undertaken in Michigan by J. R. Finlay for the Michigan Board of Tax Commissioners.<sup>66</sup> His principle of valuation was radically different from the "ore in sight" royalty method since it considered the geologic future of the property and the going concern value of the mining company. Finlay was given only two and a half months to appraise 83 copper mines, 51 iron mining companies, lists of ore lands, and over 50 salt, coal, gypsum and limestone properties.<sup>67</sup> The method of valuation selected was admittedly a compromise between capitalizing quoted stock sales, often not available, and detailed examinations of each property, which time did not permit.<sup>68</sup> The theory of the valuation was to calculate the present value of the mines to the permanent owner for production of minerals, being to

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65. Mich. Tax Comm'r, First Annual Report, 54 *et seq.* (1902).

66. Mich. Pub. Acts, No. 114 (1911).

67. He was notified of the appointment May 24, 1911, and the report was handed in August 21, 1911. Finlay obtained the assistance of five other engineers and a small staff of helpers. Dr. C. K. Leith of the University of Wisconsin was largely responsible for the iron ore appraisals. Valuations were based on company reports of tonnage in the ground, past shipments of the mine and in the area, cost data furnished by the mining companies; These reports were considered in the light of mining conditions and probable geologic structure of the area in which the mine was located. Transcript of Record, p. 203, Sunday Lake Iron Co. v. Town of Wakefield, 247 U. S. 350 (1918).

68. Finlay's deposition showed no physical examinations were made of the mines; he did not expect local taxation to be affected by the report; he had diminishing confidence in the value placed on any one ore body or mine. *Id.* at 128-29. Dr. Leith could not remember the dates of the visits to the mines. *Id.* at 32, 40. He subsequently recommended the Tax Commissioner discount Finlay's capitalized values about 10% against hazards. *Id.* at 35 *et seq.*

reach a sum the investor could afford to pay for the appraised property.<sup>69</sup> The appraisals in the report covered the value of the whole mining business of a company, including all the value that could be put on mineral lands, mining, milling, and smelting equipment, and mining supplies.<sup>70</sup> In this sense, it was a valuation which a prospective seller would use as the top bargaining price in negotiations with a prospective buyer.<sup>71</sup> The method frankly adopted controversial estimates as to the prospective life of the mine, based upon informed judgments as to the depth of deposits, known reserves, depths of adjoining mines, and the geologic structure of the ore bodies. The Finlay valuation marked a departure from ideas of what has been here labelled "ordinary value," to adopt a principle incorporating a few of the ideas of "market value," and chiefly ideas of "value to the owner."<sup>72</sup>

Litigation which resulted from the Finlay valuation established the capitalized future income method of wasting asset valuation in both state and federal tax law. In *Newport Mining Co. v. City of Ironwood*,<sup>73</sup> under a constitutional requirement of assessment at "cash value"<sup>74</sup> legislatively defined to mean the price at an artificial private sale,<sup>75</sup> the Michigan court sustained a directed verdict for the defendant city in an action for repayment of taxes paid under protest. The mining companies conceded the valuation method was one used by engineers generally but contended proper factors in computing value should have been "ore in sight" and the royalty rate, rather than selling price less costs. The court sustained the Finlay valuations, citing no cases, on the ground that it would be used by an "intending purchaser," and that the state could properly use the usual methods of business to ascertain the value for taxation.<sup>76</sup> The mining company had suggested no other methods to value the property. In *Sunday Lake Iron Co. v. Township of*

69. Mich. Bd. of Tax Examiners, Appraisal of Mining Properties in Michigan (J. R. Finlay) 11 (1911).

70. *Id.* at 14.

71. See note 83 *infra*.

72. Transcript of Record, p. 131, *Sunday Lake Iron Co. v. Town of Wakefield*, 247 U. S. 350 (1918).

73. 185 Mich. 668, 152 N. W. 1088 (1915).

74. Mich. Const. Art. X, § 7. "All assessments hereafter shall be on property at its cash value."

75. Mich. Pub. Acts, No. 206 § 27 (1893).

76. At the same time as the Finlay valuation, the United States Steel Corporation was defending its capital structure from charges that it was watered. It placed a valuation by the capitalized earning formula of 700 millions on its iron ore properties, or nearly 13 times the total assessments of all the iron mining property in Michigan and Minnesota. 9 Hearing, House Committee on Investigation of the United States Steel Corp. (1912, 62d Congress) 548 *et seq.* (Report, Comm'r of Corporations, 26-48).



*Wakefield*,<sup>77</sup> the company contended valuation at full value without a simultaneous reassessment to full value of neighboring non-mining property was fraudulent and denial of equal protection of law under the 14th Amendment. The decision of the state court in affirming a directed verdict for the township in an action to recover back taxes was sustained by the Supreme Court because there was insufficient evidence to show intentional and fraudulent design to overvalue in the method of valuation adopted. The mining company also failed in the record to establish discrimination due to administrative failure immediately to reassess adjacent landowners. Evidence of undervaluation of other property indicated the mine had been equally undervalued until the 1911 assessment. The trial court expressed doubts that the Finlay valuation was valid because it assessed "going concern value" rather than the value of the mine,<sup>78</sup> but on appeal to the state supreme court this issue was not argued; the mining company made "no serious criticism" in the state court of the method of appraisal;<sup>79</sup> and the valuation method was sustained there on authority of the *Newport* case.<sup>80</sup>

The rationale of the decisions accepting the capitalized future earnings method of valuation had been that in absence of frequent sale of mines, it was proper to substitute value to the hypothetical investor. But in *Cleveland-Cliffs Iron Co. v. Republic Township*<sup>81</sup> the mine had been sold recently at what was found to be bona fide, good-faith transaction at a price substantially below the tax commissioner's valuation. The court sustained refusal to lower the valuation to the new owner on application to the township board of equalization since the usual business negotiations for sale did not take into consideration nonvisible ore; and that one sale was not numerically adequate to set a fair cash value. The first ground of the decision was inconsistent with the assumption of the business practices of the hypothetical investor used in the 1911 valuation. It now appeared that the capitalized future earnings method of mine valuation was well established in judicial thinking, at least in Michigan, and perhaps before the Supreme Court, but without

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77. 247 U. S. 350 (1918). *But cf.* *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441 (1923).

78. Transcript of Record, pp. 177-78, *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U. S. 350 (1918).

79. *Id.* at 290, 291. See also *Sunday Lake Iron Co. v. Wakefield Tp.*, 186 Mich. 626, 630, 153 N. W. 14, 16 (1915).

80. *Newport Iron Co. v. City of Ironwood*, 185 Mich. 668, 152 N. W. 1088 (1915).

81. 196 Mich. 189, 163 N. W. 90 (1917), *dismissed*, 248 U. S. 592 (1919) (at request of plaintiff in error).

serious consideration of the merits once it had been adopted as an administrative valuation expedient.

### B. The Analytic or Capitalized Future Earnings Method of Mineral Valuation

Because of the importance of the analytic appraisal method in calculating the value of an operating mineral deposit for many types of state taxes and as a basis for depletion in federal income taxation, it is necessary to examine the economic and legal assumptions involved. In this method, the mining property is considered to have a definite value chiefly by virtue of its ability to produce profit over a term of years.<sup>82</sup> To arrive at the present worth of estimated future earnings through the life of the property, estimates are first made of the available ore and probable output each year. The life of the property is determined by dividing the total tonnage by the probable yearly output. Then an estimate is made of the probable profit per unit of extraction (tons, in the case of iron ore) by deducting estimated cost per ton from the probable price per ton. The profit per unit is multiplied by the annual output to determine probable annual income. This annual income or an average for a base period is calculated to its present worth over the assumed life of the mine by use of the Hoskold formula, which sets aside (1) an allowance for the exhaustion of the deposit in form of a sinking funds or large dividends, and (2) provision for return on capital or profit at an interest rate suitable to the risk in that type of wasting asset investment. The dollar value thus obtained is the amount a purchaser could afford to pay for the property.<sup>83</sup> It is believed this appraiser's value is a *maximum* value, that is, a value which the seller might reasonably ask for the property, not a normal value as finally reached between a willing buyer and a willing seller which would be influenced by the range in differences as to judgment in the importance of the factors.<sup>84</sup>

Most of the factors involved in such a valuation involve estimates and judgments concerning which men could differ widely.<sup>85</sup> The tonnage and quantity estimates in the ground are relatively definite in the older mining areas when compared to estimates of

82. Baxter and Parks, *Mine Examination and Valuation* 103 (2d ed. 1939).

83. See, Leith, *Mineral Valuations of the Future* 30, 31 (1938). Cf. Baxter and Parks, *op. cit. supra* note 82, Appendix "A" by F. G. Pardee, "The Michigan Mine Appraisal System," 291-93; U. S. Treas. Reg. 111, § 29.23 (m)-7 (b).

84. Leith, *op. cit. supra* note 83, at 10, 11.

85. *Id.* at 33.

future annual production, future market price, and the effect of the business cycle in reducing demand or in opening up of new and competing properties. Costs per unit of output in an established property may be reasonably predicted with the aid of historical indexes over a short-run period,<sup>86</sup> but may defy prediction over the 30 or 40 year periods considered the life of major iron deposits. These uncertainties arise even before application of the Hoskold formula, with its attendant controversies over the proper sinking fund rate of interest and the suitable rate of return on risk capital in the mine investment.<sup>87</sup>

In calculating the "fair market value"<sup>88</sup> for purposes of determining a basis for depletion of mineral properties, Federal Income Tax Regulations place extensive restrictions about the use of analytic appraisal methods, such as the present value method. Analytic appraisal methods are not entitled to great weight under certain conditions and are not to be used if the fair market value can reasonably be determined by any other method.<sup>89</sup> The Commissioner will give "due weight and consideration to any and all factors and evidence having a bearing on the market value, such as cost, actual sales and transfers of similar properties, market value of stock or shares, royalties and rentals, value fixed by the owner for purposes of the capital stock tax, valuation for local or state taxation, partnership accounting, records of litigation in which the value of the property was in question, the amount at which the property may have been inventoried in probate court, disinterested appraisals by approved methods."<sup>90</sup> Four situations are listed

86. Michigan uses the past five-year period which is said to give a representative picture of the cost background, but this cost figure may be tempered by deductions for conditions which can be foreseen. Baxter and Parks, *op. cit. supra* note 82, at 296. Minnesota used an eight-year period in computing past increases of labor costs from May 1, 1932, to May 1, 1940, in *Village of Aurora v. Comm'r of Taxation*, Docket 55 Minn. B. T. A. 9 (1943) but used a five-year average for rail and lake freight and insurance; it used no stated period for the other nine out of the eleven cost items. For marketing expense, the Commissioner was permitted to use an estimate derived from his inspection of past occupation tax returns, representing what the Commissioner deemed a "fair average." It is said the selling price of ore and costs rise and fall together so that the period selected may be immaterial since the "spread" or difference remains about the same. Baxter and Parks, *op. cit. supra* note 82, at 295-96. *But quære* the time lag and effect of controlled Lake Erie prices of iron ore upon the validity of a valuation as of a given date?

87. Leith, *op. cit. supra* note 83, at 100.

88. U. S. Treas. Reg. 111, § 29.23 (m)—1 (a). *But cf.* U. S. Treas. Reg. 111, § 29.23 (m)—7 (a).

89. U. S. Treas. Reg. 111, § 29.23 (m)—7 (a); P-H 1949 Fed. Tax Serv. § 14,527, pp. 14, 460-14,462. See *Id.* § 14,528 for decisions on valuation.

90. U. S. Treas. Reg. 111, § 29.23 (m)—7 (a).

wherein the analytic appraisal methods are of questionable weight:<sup>91</sup>

- (1) "if the value of a mineral deposit can be determined upon the basis of cost or replacement value,
- (2) if the knowledge of the presence of the mineral has not greatly enhanced the value of the mineral property,
- (3) if the removal of the mineral does not materially reduce the value of property from which it is taken, or
- (4) if the profits arising from the exploitation of the mineral are in great part due to the manufacturing or marketing ability of the taxpayer or to extrinsic causes other than the possession of the mineral itself. If the fair market value must be ascertained as of a certain date, analytic appraisal methods will not be used if the fair market value can be determined by any other method."

Items (2) and (3) would seem to rule out the use of the present value method of appraisal in the case of iron deposits where the land receives its only value from the presence of iron ore, and where the land will be useless once the mine is exhausted. The objection in (4) should be especially valid in the case of mines owned by integrated steel enterprises which own, lease, or control their own properties and operating mining companies.

The Treasury has applied present value methods to determination of and value for depletion in the case of interests of the fee owner lessors of iron ore property,<sup>92</sup> although at one time the Supreme Court denied the validity of present value computations for purposes of depletion,<sup>93</sup> as well as depletion itself<sup>94</sup> in the absence of express statutory allowance under the 1909 "income tax" laws. But the objections raised in the Regulations to the use of analytic appraisals, and the preference for other methods or factors of valuation are equally valid defects in present value appraisals for purposes of state property and occupation taxes.<sup>95</sup>

91. *Id.*

92. The uses of present value methods has not been contested. *Royal Mineral Ass'n*, 5 B. T. A. 1126 (1927); *Reinecke v. Spalding*, 280 U. S. 227 (1930). *Cf. Argonaut Consolidated Mining Co. v. Anderson*, 52 F. 2d 55 (2d Cir.), *cert. denied*, 284 U. S. 682 (1931).

93. *Goldfield Consolidated Mining Co. v. Scott*, 247 U. S. 126 (1918).

94. *Stratton's Independence Ltd. v. Howbert*, 231 U. S. 399 (1913); *Goldfield Consolidated Mining Co. v. Scott*, 247 U. S. 126 (1918); *U. S. v. Biwabik Mining Co.*, 247 U. S. 116 (1918). *But cf. Doyle v. Mitchell Bros. Co.*, 247 U. S. 179 (1918); *Stanton v. Baltic Mining Co.*, 240 U. S. 103 (1916). See Magill, *Taxable Income* 348-350 (2d ed. 1945). Sixteen years after the passage of the 16th Amendment, the court changed its views to allow depletion, and apparently accepted the use of the present value appraisal. *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364 (1925) *semble* (Minnesota iron properties); *Reinecke v. Spalding*, 280 U. S. 227 (1930) (under the 1926 act).

95. Compare 1 Minn. Stat. § 298.03 (1945) which adopts certain of the factors in the present value method of appraisal as a basis of reaching the "valuation" of iron ores upon which the occupation taxes are levied.

Adoption of the present value method for property tax valuation is subject to criticism for lack of uniformity when compared to valuation methods used for agricultural or urban real estate and business properties. It is also subject to the economic defects of any capitalized income method as a measure of value. Most business and urban real estate is valued for purposes of the ad valorem property tax on the basis of various combinations of sale price of that property or nearby property, cost or reproduction cost, and current productivity. These methods attempt to assume the property has a value at the date of valuation independent of the other property or whole assets belonging to the owner,<sup>96</sup> although ability to pay unquestionably influences the outcome. The capitalized income method, used in Minnesota chiefly for wasting asset property tax valuations,<sup>97</sup> assumes the expectation of a flow of goods or of mineral product from a property can be the measure of the value of property; it further assumes a complete convertibility of the prospective mineral product into money value at each instant of future time. But the money markets are subject to cyclical movements and thus the "investor's valuation" requires an artificial assumption of normalcy which has no relation to the usual statutory definition of market value. Such assumptions of capital convertibility are of dubious validity in the case of minerals like copper, lead, or oil where the selling price of the product fluctuates widely with cyclical demand and discovery of new sources or substitutes,<sup>98</sup> and the "pegged" price minerals, such as iron ore and nickel, where the value of the mine investment is chiefly for control over the ore supply.<sup>99</sup> The most serious theoretical defect of capitalized future income methods of valuation for purposes of an ad valorem property tax, which legally should be restricted to values within the terri-

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96. 1 Minn. Stat. § 273.11 (1945). Compare standards for mineral property with standards for other property.

97. The use of present value methods of valuation seems peculiar to wasting asset enterprises, not being accepted as the single method in other fields. See 2 Bonbright, *Valuation of Property* 1012 n. 61 (1937). It is interesting to notice that use of the present value computation for Chapter 77B and Chap. X reorganizations was first seriously suggested in connection with a wasting asset enterprise, although this does not appear in the statement of facts in the Supreme Court. *Consolidated Rock Products Co. v. Du Bois*, 312 U. S. 510 (1941); see *Consolidated Rock Products Co. v. Du Bois*, 114 F. 2d 102, 103 (9th Cir. 1940). Under Chapter X of the Chandler Act, the SEC can recommend a valuation to the District Court. It appears the Commission favors use of capitalized future earnings appraisals for industrial concerns as well. Cf. *Flour Mills of America*, 7 SEC 1, 15-19 (1940).

98. Leith, *Mineral Valuations of the Future* 80 (1938).

99. TNEC, *supra* note 5, at 10360-72. Apparently the chief advantage of integration is not so much from control of price of the ore as from improvement of competitive position in steel marketing. *Id.* at 10271-10283.

torial limits of the state, is the impossibility of valuing only the local mine part of the enterprise as distinguished from the whole assets of the integrated ore mining, transportation, marketing, and steel mill enterprises.<sup>100</sup> This theoretical defect is also a very practical defect in the case of the Minnesota methods of valuation.

### C. Minnesota Ad Valorem Property Tax Valuation Methods— Administration and Judicial Review Prior to 1939

The early Minnesota valuations of iron ore for ad valorem property tax purposes, after the tonnage tax was invalidated in 1898,<sup>101</sup> were chiefly a matter of guess or compromise,<sup>102</sup> until 1907, the tax was levied by the mine owners and operators meeting to spread the assessment over the operating mines according to value of tonnage produced, which may have favored large mines with big reserves.<sup>103</sup> This distribution by output prevented the establishment of any settled principles of local assessment.<sup>104</sup> In 1907, the tax commission undertook its first valuations, and, after investigation, adopted the selling price of the property as representative of taxable value, using the previous sale price of the property or adjacent properties as a basis to determine the taxable value of all real property, including mineral lands.<sup>105</sup> As early as 1909, the Tax Commission obtained the expert services of the School of Mines of the University of Minnesota to estimate tonnages and prospective life of properties on the basis of reported geology, engineering data, and more recently, field surveys;<sup>106</sup> but it should be noted that these services have been limited to a few properties each year and only furnished an estimate of tonnage, not a com-

100. 1 Bonbright, *Valuation of Property* 226 (1937). Thus, the following factors in the present value computation outlined note 83 *supra*, include elements which are not strictly values at the mine: Selling price of the product per unit; the profit margin between the cost deductions and the interstate selling price; the rate of production which may be due to control of a market outside the state of production and power to transport or utilize the mineral; the risk rate of return on capital which may be fixed not by the hazards of that particular mine or mining business but rather by money market conditions; the sinking fund capital investment return which also may be fixed by extraterritorial market conditions.

101. *State v. Lakeside Land Co.*, 71 Minn. 283, 73 N. W. 970 (1898).

102. Minn. Tax Comm'n, *Seventh Biennial Report*, 21, 22 (1920).

103. Minn. Tax Comm'n, *supra* note 64, at 110, 111.

104. Lutz, *The State Tax Commission* 404 *et seq.* (1918).

105. Minn. Tax Comm'n, *supra* note 102.

106. Lutz, *op. cit. supra* note 104, at 405. This was a significant improvement over existing methods of obtaining engineering data upon which to base any valuation of the mineral property. Use of the School of Mines valuations in Minnesota probably led to the Finlay valuation of 1911 in Michigan. See Transcript of Record, p. 32, *Sunday Lake Iron Co.*, 274 U. S. 350 (1918).

plete appraisal or valuation for tax purposes.<sup>107</sup> The Tax Commission found that sales of fee title to ore properties were not sufficiently numerous to justify use of the sale price method of valuation;<sup>108</sup> and in 1913, two years after the Finlay valuation, obtained passage of the classified ad valorem property tax statute to minimize the problem of systematic undervaluations of other property, and the problem of equalizing mine valuations.<sup>109</sup>

Influenced by the Finlay valuation and its success in the courts, the Minnesota Department of Taxation uses a method of determining "value" for purposes of the classified ad valorem property tax which it described as a "net profits" method of valuation.<sup>110</sup> Selling price at lower Lake Erie docks less the cost of mining and shipping the ore results in net profit for the year. Since all the ore cannot be shipped in one year or any definite period, this net profit is capitalized under the Hoskold formula over the prospective life of the mining area as a whole.<sup>111</sup> The tax rates are applied to the value thus obtained.<sup>112</sup> Costs are taken over a period in the past selected by the Commissioner of Taxation as representative of each iron range and as an indication of future costs; in individual cases variations from the range average of costs may be determined by the Commissioner.

In addition to the statutory classification of iron mines for assessment at 50% of "true value," the Department of Taxation

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107. Cf. Minn. Dep't of Tax., 18th Biennial Report, 69, 70 (1942). See Minn. Resources Comm'n, Interpretation of an Economic Analysis of the State of Minnesota 26 (1945) (based on a report by the J. G. White Engineering Corp.).

108. Minn. Tax Comm'n, *supra* note 102. Cf. State v. Moore, 12 Cal. 56 (1859) (enough sales of mineral interests to permit value to be ascertained with sufficient accuracy); Cleveland Cliffs Iron Co. v. Republic Township, 196 Mich. 189, 163 N. W. 90 (1917), *dismissed*, 248 U. S. 592 (1919) (price at which the mine sold irrelevant to valuation under present value method).

109. See Lutz, *op. cit. supra* note 104, at 400 *et seq.*; 1 Minn. Stat. § 273.13 (1945).

110. Minn. Tax Comm'n, *supra* note 102, at 22.

111. *Id.* at 20, 21. This is essentially the same method adopted by Finlay and discussed above as the analytic appraisal or capitalized future earnings method. See also Report, *supra* note 107, at 53-60.

112. Substantially the same sort of net profit computation based on Lake Erie Price is used to reach the "valuation of all ores mined or produced" for purposes of the Mining Occupation Tax. 1 Minn. Stat. § 298.03 (1945) establishes the deductions permitted for the occupation tax alone, and in addition provides, "(6) The amount or amounts of all foregoing subtractions shall be ascertained and determined by the commissioner of taxation." The Department has adopted the same cost computation methods for both the occupation tax, and the ad valorem property tax which is the tax being discussed here. Cf. State *ex rel.* Inter-State Iron Co. v. Armson, 166 Minn. 230, 207 N. W. 727 (1926). See Minn. Dep't of Tax., *supra* note 107, at 53, 54; Report, *supra* note 4, at 9 (Item 9).

makes a further subclassification<sup>113</sup> of operating properties<sup>114</sup> into nine groups to which it assigns class rates, or assessed values per ton of ore in the mine. These nine subclasses depend upon variations in analysis or grade of ore shipped, costs of mining, geographic location, and geologic structure of the deposit. This basis of the valuation is essentially a capitalized future earnings computation for a *class of properties* rather than for any individual mine.

As has already been noted, a capitalized future earnings theory of valuation normally considers "going concern" value as applied to a single mining enterprise. The effect of the Minnesota method, however, is to consider mines as grouped enterprises, according to "natural differences of situation and location," rather than according to differences in management or corporate efficiency which would also heavily influence the hypothetical investor's calculations.<sup>115</sup> There is the added difficulty that most mines in the group may be part of an integrated steel enterprise and have substantial ability to pay, whereas an independent operator, owner-operator, or prospective new operator is compelled to carry the integrated concern ton rate valuations represented by the major mines in the subclass<sup>116</sup> for purposes of taxation, although he might be less efficient cost-wise. Use of the Lake Erie price as a basis from which to compute value has the further effect of including extra-territorial values for the "independent" operator and of charging him for a controlling position he does not occupy, since most independent ore sales contracts were admittedly made below the Lake Erie price.<sup>117</sup>

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113. Report, *supra* note 4, at 10.

114. *Id.* at 10, 177. There is no statutory authority for this method of subclassification, although under the equalization power of the Commissioner, 1 Minn. Stat. § 270.11 (6) (1945), there is power to "raise or lower the assessed valuation of any real or personal property, including the power to raise or lower the assessed valuation of the real or personal property of any individual, copartnership, company, association, or corporation"; with suitable provisions for notice at least five days before the day of hearing.

115. Cf. Baxter and Parks, *Mine Examination and Valuation*, 14 (2d ed. 1939) ("A careful investor will scrutinize the management of a mine before he investigates its mineral resources and recent production statistics.") The Minnesota subclassification grouping of mineral properties seems to penalize careful management since no amount of cost savings could change the location or original iron content of the ore. J. G. White Engineering Corp., II Economic Analysis 130 (1945) (original report).

116. The absence of such independent or owner-operators is a marked feature of the Lake Superior District even as to low-cost open pit ores. To this extent, the present system of valuation serves to assist the exclusive control maintained by the integrated enterprises free from prospective competition. TNEC, *supra* note 5, at 10286, 10287-10290 (reference to prospective opening up of a property by Butler Bros., then an independent, absorbed by M. A. Hanna Co. in 1948).

117. *Id.* at 10313 *et seq.*



The initial legal question is relevance of a capitalized future income technique of valuation to the statutory requirements of "value" for tax purposes.<sup>118</sup> Minnesota statutes require that iron ore shall be valued and assessed at 50 per cent of its full and true value.<sup>119</sup>

"'Full and true value' means the usual selling price *at the place where the property to which the term is applied shall be at the time of assessment*; being the price which could be obtained therefor at private sale and not at forced or auction sale."<sup>120</sup>

"All property shall be assessed at its true and full value in money. . . . In valuing real property upon which there is a mine or quarry, it shall be valued at such price as such property, including the mine or quarry, would sell for at a fair, voluntary sale, for cash."<sup>121</sup>

"In determining such value, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion of value the price for which such property would sell at auction or at a forced sale, or in the aggregate with all the property in town or district; . . ."<sup>122</sup>

The classified ad valorem tax provision,<sup>123</sup> governs the method of valuation used for ore lands; this section is completely ambiguous as to the proper meaning of "full and true value," or the methods to be used to reach that value.<sup>124</sup> Under the previously existing judicial definitions of value, "full and true value" meant the usual selling price at the time of the assessment such as could be obtained at a private sale, and not at a forced sale.<sup>125</sup> The usual selling price of "like property in the same locality" is the present standard of value for taxation of urban real estate, timber lands, and business property;<sup>126</sup> to ascertain the sale value of these kinds of property, the assessor can consider the location of the land, revenue derived from it, and reproduction cost; it is immaterial that the property could not be sold for the valuation placed on it

118. *State v. Trask*, 167 Minn. 304, 209 N. W. 18 (1926).

119. 1 Minn. Stat. § 273.13 (2) (Class 1) (1945) (adopted 1913).

120. 1 Minn. Stat. § 272.03 (9) (1945) (1939 from earlier statutes).

121. 1 Minn. Stat. § 273.11 (1945) (first adopted 1860).

122. *Ibid.*

123. 1 Minn. Stat. § 273.13 (1945).

124. *In re Potlach Timber Co.*, 160 Minn. 209, 199 N. W. 968 (1924) (urban business property).

125. *E.g.*, *State v. Atwood Lumber Co.*, 96 Minn. 392, 105 N. W. 276 (1905) (timber lands cut between assessments); *State v. Trask*, 167 Minn. 304, 209 N. W. 18 (1926) (cut over timber lands); *State v. Koochiching Realty Co.*, 146 Minn. 87, 177 N. W. 940 (1920) (timber lands and real estate); *In re Potlach Timber Co.*, 160 Minn. 209, 199 N. W. 968 (1924) (urban business property); *State v. Russell-Miller Milling Co.*, 182 Minn. 543, 275 N. W. 22 (1931) (inoperative flour mill over-valued); *State v. Federal Reserve Bank*, 25 F. Supp. 14 (D.C. Minn. 1938) (bank building).

126. *State v. Federal Reserve Bank*, 25 F. Supp. 14 (D.C. Minn. 1938).

for tax purposes<sup>127</sup> if the assessor has considered all the factors present in reaching true sale value.

Under present revisions of the statutes, the definition in M. S. A. § 272.03 (Supp. 1949) would appear to govern<sup>128</sup> the meaning of "full and true value," and perhaps alter the meanings judicially given to these words when construing other sections. This definition contains express limitations as to the place where the selling price is to be computed which would seem to *exclude* extraterritorial values; otherwise it is consistent with the definitions earlier adopted by the courts. However, none of the ad valorem tax definitions specifically or impliedly authorize the use of a capitalized future earnings test of value for mineral lands, nor a standard of valuation different from that applied to other property.

The reason advanced for administrative adoption of the analytical appraisal technique for mineral lands alone is the absence of frequent market transfers of mines or mineral lands. While this has been factually correct, the same absence of frequent sales may be true of timber lands; likewise a wasting asset, which are less frequently transferred as the area approaches exhaustion.<sup>129</sup> The discretion of the Tax Commission and Department of Taxation in selection of an appropriate method of valuation has been sustained in the use of the capitalized future earnings theory of valuation, partly because no substitute method was offered,<sup>130</sup> and partly because the contesting parties conceded the validity of the method,<sup>131</sup> arguing only the choice of factors used by the administering agency.

127. *State v. Federal Reserve Bank*, 25 F. Supp. 14 (D.C. Minn., 1938).

128. As amended by Minn. Laws 1947, c. 325, § 1. "Subd. 8 . . . 'Full and true value' means the usual selling price at the place *where the property* to which the term is applied *shall be at the time of assessment*; being the price which could be obtained at private sale and not at forced or auction sale." (Italics added.) "Subd. 3. Construction of terms. For the purpose of chapters 270 to 284, unless a different meaning is indicated by the context, the words, phrases, and terms defined in subdivisions 4 to 11 shall have the meanings given them." 2 Minn. Stat. § 645.26 (1945) governs the construction to be given two conflicting provisions enacted at different sessions.

129. *State v. Atwood Lumber Co.*, 96 Minn. 392, 105 N. W. 276 (1905); *State v. Trask*, 167 Minn. 304, 209 N. W. 18 (1926) (timber lands). Cf. *State v. Koochiching Realty Co.*, 146 Minn. 87, 177 N. W. 940 (1920). Likewise in a settled community, transfers of business real estate become infrequent. *State v. Federal Reserve Bank*, 25 F. Supp. 14 (D.C. Minn. 1938) (rejected use of the capitalized future earnings valuation offered by the taxpayer in depression period).

130. But cf. the factors considered in reaching value for purposes of finding a basis for depletion under the Federal Income Tax. U. S. Treas. Reg. 111, 29.23 (m)—7 discussed notes 88-92 *supra*.

131. *State ex rel. City of Ely v. Minn. Tax Comm'n*, 137 Minn. 20, 162 N. W. 675 (1917); *State v. Oliver Iron Mining Co.*, 198 Minn. 385, 270 N. W. 609 (1936); *Village of Aurora v. Comm'r of Taxation*, 217 Minn. 64, 14 N. W. 2d 292 (1944).

Although the statutes are silent, the relevancy of the method used in relation to the statutory standard seems to have been assumed as a matter of necessity, and perhaps later as a matter of choice of the mining companies.

The Lake Erie price, which is the "market value" of ore used as the basis of the analytic appraisal, has been found to be a "pegged" price; that is, subject to the control of the major mining and steel companies.<sup>132</sup> This price is derived from the first quoted price for a substantial sale at the beginning of an iron ore shipping season, based on a spot sale or a new long-term contract. It then becomes the uniform spot sale price for the rest of the season, although most contracts for the sale of ore and royalty leases of iron properties are based on a sliding scale percentage *below* the Lake Erie price in accordance with tonnage taken. Since the Lake Erie price has remained the same for long periods of time,<sup>133</sup> and since there is evidence the price has been influenced by agreements<sup>134</sup> among only the large producers and consumers of ore, price value of the ore from which the deductions are taken to reach net profit is said to be in control of the operating companies and hence may be considered an improper basis to use in a tax valuation.<sup>135</sup> The further advantage of Lake Erie price from the point of view of the integrated companies is that the sale contracts can remain confidential.<sup>136</sup> The Lake Erie price has the validity for tax purposes of being an openly quoted price, accepted by the trade journals, and considered as a pricing basis in the trade itself although not reflective of the actual contract prices paid for the ore.<sup>137</sup> To the

132. *State v. Oliver Iron Mining Co.*, 198 Minn. 385, 390, 411, 270 N. W. 609, 612, 623 (1936). Cf. the precise memorandum opinion of the five-judge district court, printed in Report, *supra* note 4 at 182, 187. See TNEC, *supra* note 5, at 10305-307, 10311, 10312, 10317-325, 10328, 10330, 10343.

133. 1925-1928: \$4.25/ton; 1929-1936: \$4.50/ton; 1937-1939: \$4.95; 1940-1945: \$4.45/ton. TNEC, *supra* note 5, at 10311, 10439 (Exhibit 1367). 1946—\$5.05; 1947—\$5.55; 1948—\$6.20. See Report, Dep't of Taxation, p. 61 (1947-1948).

134. See TNEC, *supra* note 5, at 10305-10307, 10311, 10312, 10317-10325, 10328, 10330, 10343.

135. The more precise argument against use of such a controlled price is probably sub-delegation of control over an element in the valuation to the private group or industry as a violation of the distribution of powers clauses in the Minn. Const., Art. III. Cf. *Eubank v. Richmond*, 226 U. S. 137 (1912); *Seattle v. Roberge*, 278 U. S. 116 (1928) (zoning delegations invalid). *But see State v. Board of Medical Examiners*, 34 Minn. 387, 388, 26 N. W. 123, 124 (1885) (express legislative delegation); Note, 15 Minn. L. Rev. 814 (1931).

136. TNEC, *supra* note 5, at 10309.

137. TNEC, *supra* note 5, at 10307, 10334. Thus there is an equally strong argument that the trade practice or custom is being incorporated by reference into the valuation, the standard itself having independent sig-

extent that the fixed price represents a combination of values at the mine and value to the controlling or owning consuming steel companies, it includes going concern values which we have called "value to the owner." To the extent this is a fictitious price, a prospective independent producer or owner-operator would be charged on his tax bill for a profit margin which included an ownership premium the state considered as ability to pay due to integration. And the owners of non-producing or reserve properties are taxed for the potential value such ore may have in an integrated enterprise.

The most serious objection to use of the Lake Erie price rather than the actual contract sale prices in valuation computations is that it includes values which have no "actual situs" in the state;<sup>138</sup> namely, the selling commissions, the cost of transportation to the lake for loading docks, and lake transportation from upper lake ports to Lake Erie. It is a delivered price. The transportation rates of iron ore are controlled partly by the I.C.C. and partly by the consuming steel companies,<sup>139</sup> since one major railroad and virtually all the lake vessels are subsidiaries of the integrated steel companies. Both the vessels used and the ore selling organizations are domiciled outside the state; and both organizations often have no legal relation to the mining company except by contracts to haul or to accept a certain proportion of output at a fixed rate per ton. It is true these costs are deductions in the Minnesota valuation calculation, but the selling and shipping charges selected are an average of *past* rates, not true estimates of the future cost. To the extent the price level trend is upward, the deductions may have no correlation with present or future shipping and selling costs. Thus, as based on Lake Erie prices, capitalization to present value of future earnings include: (a) tangible costs payable for services having no situs or performance in the state, and (b) intangible values due to integration; namely, the power to consume, and control over contracts, methods of transportation, and sales, none of these intangible values having an actual situs within the state.

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nificance, by analogy to the wills and trusts doctrines. *Cf.* *Stubbs v. Sargon*, 3 My. & Cr. 507 (1838); *Merrill v. Boal*, 47 R. I. 274, 132 Atl. 721 (1926). *But cf.* *State v. Oliver Iron Mining Co.*, 198 Minn. 385, 412-15, 270 N. W. 609, 623-25 (1936) (Hughes, J., dissenting below; quoted by Devaney dissenting).

138. See *Delaney v. Murchie*, 177 F. 2d 444, 448 (1st Cir. 1949).

139. TNEC, *supra* note 5, at 10377-10381. The relationship of lake freight (a cost item in the valuation calculation) and of rail freight (also a cost item) to the actual contract price is quite complex. The important fact is that cost deductions for tax purposes do not include the actual costs paid, but rather an average of these costs over an administratively selected base period.

The analysis of power to levy a property tax becomes a question of the "situs" of the property taxed. This is essentially a mixed question of law and fact, that is, one of determining where the facts of the particular property assessed should be placed on either side of a judicially drawn, imaginary line of territorial jurisdiction of the taxing unit. A finding that "situs" exists for purposes of the tax may simply be a means of stating a result and give no clue to the process by which the result was reached.<sup>140</sup> The approach of the courts in the recent cases has been via the power to tax with little enlightenment as to why the situs was selected in a particular place.<sup>141</sup> The question of situs of tangible real and personal property of a foreign corporation doing business in the taxing state should be distinguished from taxability and situs of property used in interstate commerce<sup>142</sup> where the result can be mathematically apportioned by the taxing authorities.

In the property tax situation, as to incidents of taxation which are not measurable in strictly territorial terms but are contracts or services rendered in other states necessary to activity in the taxing state, a useful approach would seem to be a weighing of the competing states' claims and contacts as to the particular incidents being taxed.<sup>143</sup> Conflicts of laws analysis, analogous to that used in choice of laws cases involving jurisdiction over a foreign corporation for purposes of directors liability or corporate transfers leading to insolvency,<sup>144</sup> would seem valuable in appraising both the extra-territorial tangible incidents taxed in a valuation formula and the intangible values represented by integration and ability to consume.

The situs of contracts for sale of iron ore and the organizations performing those services are an example in point. These sales contracts and the organizations making them are located in the lower

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140. See Powell, *The Business Situs of Credits*, 28 W. Va. L. Q. 89-91 (1922) (discussion of taxation of intangibles is equally relevant to the tangible costs and items used in the deductions from Lake Erie Price).

141. Cf., e.g., (a) *Death Tax Cases*: Curry v. McCanless, 307 U. S. 357 (1939); Graves v. Elliott, 307 U. S. 383 (1939); State Tax Comm'r v. Aldrich, 316 U. S. 174 (1942). (b) *Ad Valorem Property Tax*: Virginia v. Imperial Coal Sales Co., 293 U. S. 15 (1934) (domicile and situs in the state).

142. *Viz.*, the "unit rule" cases dealing with railroad cars, and railroad or utility mileage apportionments for taxation. E.g., Union Refrigerator Transit Co. v. Ky., 199 U. S. 194 (1905); Cleveland C. C. & St. L. Ry. v. Backus, 154 U. S. 439 (1894).

143. Cf. *Wheeling Steel Corp. v. Fox*, 298 U. S. 193 (1936) (analysis of amount and kind of business contacts the corporation had in the taxing state, such as the location of its home offices, payrolls, etc.).

144. Cf. *German-American Coffee Co. v. Diehl*, 216 N. Y. 57, 189 N. E. 875 (1915); *Warner Co. v. Foshay Co.*, 57 F. 2d 656, 662 (8th Cir. 1932).

lake port cities. Cost of the sales is a controversial item in the Lake Erie delivered price of iron ore to the steel mills.<sup>145</sup> Although the wholly owned mining subsidiaries of steel companies do not have independent organizations performing ore sales services, they do charge mill operations for such services in their internal book-keeping, which closely reflects Lake Erie price.<sup>146</sup>

Similarly, contacts of the separate subsidiaries or companies operating lake vessels with Minnesota are few and fleeting. Most vessels are registered in other states; the largest fleet is an entirely separate corporation from the mining company; administration and scheduling is done in Cleveland and lower lake ports. The chief contact with Minnesota is to load ore at the lakehead ports.<sup>147</sup>

The situs of the intangible value labelled integration is much more elusive, analogous to a chose in action, or to asset values above appraisals of fixed assets for a corporation balance sheet. Courts have recognized such a value exists, and have separated it, in the case of privilege taxes on capital structure or taxes on credits, from the physical assets of the corporation, in requiring apportionment of the tax on a non-domiciliary corporation engaged in interstate commerce.<sup>148</sup> But some cases tend to look behind the place and legal structure of incorporation, to apply tests of contacts with the taxing state as a test of "doing business" more readily in the integrated situation.<sup>149</sup> And the slightest contact with a taxing state may conceivably be seized upon to give the taxing state an excuse for jurisdiction, even if multiple state taxes on the subject of interstate commerce may result.<sup>150</sup> But in the case of wasting asset enterprises, where the mining has been declared a local enterprise

145. See *Village of Aurora v. Comm'r*, Docket 55 Minn. B.T.A. 11 (1943), *aff'd*, 217 Minn. 64, 14 N. W. 2d 292 (1944) (evidence showed estimates of cost of sales varied from 3½ cents a ton to 10 cents a ton).

146. TNEC, *supra* note 5, at 10330; Docket 55 Minn. B.T.A. 11 (1943).

147. TNEC, *supra* note 5, at 10330 *et seq.*

148. *Southern Ry. v. Ky.*, 274 U. S. 76 (1926); *Union Tank Car Co. v. Wright*, 249 U. S. 275 (1919); *Adams Express Co. v. Ky.*, 166 U. S. 171, 183 (1897); *Cleveland Ry. v. Pa.*, 15 Wall. 300 (U.S. 1873); *Chicago I. & L. Co. v. Lewis*, 12 F. 2d 802 (D.C. Ky. 1925) (in connection with use of a capitalized future earnings valuation).

149. *Wheeling Steel Corp. v. Fox*, 298 U. S. 193 (1936); *Cream of Wheat Co. v. Grand Forks County*, 253 U. S. 325 (1930); *Adams Express Co. v. Ohio*, 166 U. S. 185 (1897). *Cf. Cudahy Packing Co. v. Minn.*, 246 U. S. 450 (1918).

150. *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80 (1948) (commerce clause). The implications of this case on the question of jurisdiction to tax tangibles as well as intangibles, based on a contact of bare maintenance of equipment touching the state, are rather startling. *Cf. Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292 (1944).

for state tax purposes,<sup>151</sup> inclusion of integration values via the Lake Erie price and by low interest rates used in the Hoskold formula would seem a questionable administrative practice, especially when the capacity to consume, transport, and raise capital lie wholly outside the state. It is submitted that the proper test for valuation purposes should be a weighing of territorial contacts of the state with the integrated non-mining activities against the extent to which the non-mining activities are benefited by the protection, research, and services accorded by the state, rather than pure power to tax, or lack of it.

Two other factors in the Department of Taxation formula involve intangible extraterritorial values. Litigation over the capitalized future income methods of valuation has often centered about the interest rate on earnings of mining property to be used in the Hoskold formula, and the related rate of return on capital invested.<sup>152</sup> The first of these factors represents an arbitrary assumption as to what the hypothetical investor would require as earnings considering the hazards in wasting asset enterprises. The second postulates a return of the capital invested in the mine, equipment, and development. It is normally true that the investor in mine property is found chiefly in the centers of population and rarely is familiar with conditions surrounding the particular area or property; he expects to have an early high rate of return to induce his initial investment.<sup>153</sup> Another aspect of the interest rate as used in the Hoskold formula is that it capitalizes either a sinking fund

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151. *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172 (1923) (occupation tax); *Lake Superior Iron Mines v. Lord*, 271 U. S. 577 (1926) (royalty tax which has been held by the Minnesota court to be a property tax).

152. *State v. Oliver Iron Mining Co.*, 198 Minn. 385, 270 N. W. 609 (1936); *Village of Aurora v. Comm'r of Taxation*, 217 Minn. 64, 14 N. W. 2d 292 (1944) (valuations for the ad valorem property tax). Cf. *State ex rel. Interstate Iron Co. v. Armson*, 166 Minn. 230, 207 N. W. 727 (1926) (occupation tax; rate of interest for depreciation of mine plant disallowed as deduction against cost); *Argonaut Consolidated Mining Co. v. Anderson*, 52 F. 2d 55 (2d Cir. 1931); *Royal Mineral Ass'n* 5 B.T.A. 1126 (1927).

153. *Baxter and Parks, Mine Examination and Valuation* 144 (2d ed. 1939). The risk rate was set by the court for certain iron mining properties at seven per cent in *State v. Oliver Iron Mining Co.*, 198 Minn. 385, 270 N. W. 609 (1936); but in 1943 the Board of Tax Appeals reduced this rate to six per cent, *Docket 55 Minn. B.T.A.* (1943). Contrast this "risk rate" to the range of risk rates recommended by the SEC in its capitalized future earnings estimates for reorganizations: 12%-14.9% (Low risk); 15%-19.9% (Medium risk); 20%-24.9% (High risk); over 25% very high risk. See *Flour Mills of America, Inc.* 7 SEC 1, 9, 18 (1940) (using the low rate of 12 per cent to determine insolvency); *Dewing, Financial Policy of Corporations* 175 (3d ed. 1934). Mining has always been considered a high risk investment, if not because of the physical hazards, then because of the uncertain market and competition. See *Leith, Mineral Valuations of the Future* 101, 102 (1938).

to provide against exhaustion,<sup>154</sup> or it represents a fund from which dividends will be paid, including a liquidation of the original investment over the life of the mine.<sup>155</sup> Both premises of the interest rate represent "value to the owner," who may be domiciled elsewhere, and not necessarily "sale value"<sup>156</sup> at the place of valuation. Integration and control potentialities of the property may place the "value to the owner" at a figure far in excess of value to an investor; on the other hand, a turn of the business cycle or the opening of other mines may make the property even worthless to an investor.<sup>157</sup> To tax the rate of return on future capital invested in mining plants in effect taxes the prospective investor upon the ability of the largest integrated company to raise capital in out-of-state money markets. It assumes that the interest rate varies with the future price level and with the reproduction cost of the plant, which in effect places a taxable value on the plant investment based upon a foreign money market fluctuation. The position of an owner of mineral property may fall within all or none of these assumptions depending upon a wide variety of factors: whether the property is speculative reserve land or an operating mine; the reserve tonnage in the mine "in sight"; whether the mine is open pit or underground; the dangers of mining it; the bargaining position of the owner due to burdens of back taxes;<sup>158</sup> his access to financial support; the purpose for which the mineral property is being acquired—to control it or to operate it; his control of costly means of transportation. These intangible factors may or may not have any contact with the state.

Current thinking on the subject tends to analyze such intangibles in a special method of "discounting for hazards," that is, reducing the valuations reached through the usual Hoskold formula by later applying deductions expressed in terms of a per cent of capitalized investment value.<sup>159</sup> This may be a circuitous means of returning the valuation to conditions at the actual situs of the property, desirable in result, but tending to show the remoteness of the assumptions of the Hoskold calculation from the territorial confines of the taxing state.

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154. *Id.* at 99.

155. *Id.* at 100.

156. *Id.* at 11, 31.

157. Baxter and Parks, *op. cit. supra* note 153, at 91.

158. See J. G. White Engineering Corp., II Economic Analysis 134-36 (1945) (original report).

159. Baxter and Parks, *op. cit. supra* note 153, at 145. Cf. Leith, *op. cit. supra* note 153, at 98 (uses a blanket high risk rate of interest of 15 to 20 per cent).



Having examined the most controversial factors<sup>160</sup> in the capitalized future earnings methods of valuation as applied by the Minnesota Department of Taxation to operating properties, we are in a position to consider the success of this valuation in the courts. In Minnesota, as elsewhere, the litigation has centered about the factors used in the formula, especially costs and the interest rates. Perhaps necessity requires use of some form of capitalized future earnings formula as the basic method, although other methods are known to be available; but this premise seems to be accepted by the Minnesota courts more by stipulation and agreement of the parties than because it has been argued seriously.

In *State v. Oliver Iron Mining Co.*<sup>161</sup> the state brought suit to collect the balance of back ad valorem property taxes, part of which had been paid under protest, from certain lessee operating companies. The companies defended that their properties had been overvalued and that the assessment erroneously used too low deductions of costs and improper interest rates. The trial court, after a special hearing before five state district judges, held that the commission's valuation was too high, adopting by stipulation of the parties a future earnings formula in a form the trial court created to make a judicial valuation of one of the 41 contested properties. In the 4-1 decision, the trial court split only over use of the Lake Erie price as the basis for the computation of net earnings, the dissenting judge arguing that inasmuch as the Lake Erie price was "pegged" and the mining companies refused to reveal the contract price to consumers, the tax commission's valuation should stand. On appeal, the Minnesota Supreme Court sustained the findings, opinion evidence heard, valuation formula created, and sample valuation established by the trial court. It appeared later that the formula used in the trial court was ordered for the 41 properties involved in the litigation, but that the Tax Commission continued to use its classified grouping valuations for other properties not litigated, refusing to recognize the court's formula except as to litigated properties.<sup>162</sup>

In the next case involving ad valorem property tax valuations, *Village of Aurora v. Commissioner of Taxation*,<sup>163</sup> the procedural

160. Discussion of the effect of postponement of the date of opening a reserve mine, called "deferment," has been omitted. However, the sale value of a property to an integrated enterprise may be reduced substantially if a long deferment period is involved.

161. 198 Minn. 385, 270 N. W. 609 (1936).

162. Report, *supra* note 4, at 153.

163. 217 Minn. 64, 14 N. W. 2d 292 (1944).

situation had been changed by the Reorganization Act of 1939, so much that the decision turned on the finality of a decision of the Minnesota Board of Tax Appeals. The municipality had appealed to the BTA a valuation on mining property set by the Commissioner, alleging undervaluation. The mining companies involved started suit in a state district court, alleging overvaluation. At the preliminary hearing before the Board of Tax Appeals there was a question whether the issue of overvaluation was properly before it or only the undervaluation issue as raised by the municipality; the Board held the issue of undervaluation was the sole issue and that it would not stay its proceedings because of a pending suit in the district court due to the difference in issue.<sup>164</sup> In the final hearing before the Board of Tax Appeals, the Board affirmed the Commissioner's formula but revised the proper interest rates in the Hoskold formula, granted less deductions for capital invested and ruled on other deductions adversely to the taxpayer, raising the valuation set by the Commissioner.<sup>165</sup> On appeal, by the taxpayer, the Minnesota Supreme Court in an extended decision, held the finding of the Board increasing the valuation was final as purely a question of fact, but in the long dictum discussed the valuation formula, adopting much of the Board's views on valuation law as its own. The Court re-announced the valuation method used by the trial court in the 1936 *State v. Oliver Iron Mining Co.* decision, but in effect held that the valuation was no longer a judicial matter once the Commissioner's position had been passed upon by the Board of Tax Appeals, in absence of a clear-cut question of law.<sup>166</sup>

The result of these decisions indicates the reluctance of a reviewing appellate court<sup>167</sup> to redetermine mine valuations or to open the questions of jurisdiction to tax and selection of the basic method of mineral valuation on its own motion, although it has done so in the case of ordinary business and timber properties.<sup>168</sup> The judgment of the administrative authorities is permitted to stand unless the mining company can bring overwhelming expert testimony and clear evidence to substantiate its position. The wisdom of establishing finality of the Board of Tax Appeals findings where there is also an implied selection of the rules of law will be dealt with below,<sup>169</sup> but the effect of the *Aurora* decision has been to re-

164. Docket 55a Minn. B.T.A. (1941).

165. Docket 55 Minn. B.T.A. (1943).

166. For this aspect of the case see Part IV, C, p. 433 *infra*.

167. See also cases cited note 274 *infra*.

168. See notes 125, 129 *supra*.

169. Part IV, C *infra*.

move the questions of mineral valuation and assessment from effective judicial supervision.

Inconsistent administration of analytic valuation methods and inclusion of extraterritorial factors in the Minnesota capitalized earnings formula, unchecked judicially, points to need of a substitute for the ad valorem property tax. The cumbersome nature of mineral valuation, incessant litigation and controversy, and fluctuating yield which often has no relation to the sale value of the property or ore productivity emphasizes the need in Minnesota for a *tonnage production tax*, apportioned between the municipalities and the state, and in lieu of other taxes. Such a pay-as-you-go mine tax policy could encourage investment of new capital in the state to develop and mine low grade ore. It would not force existing reserves of high grade ore into the hands of a few owners unwilling to spend new capital, which is the result of present policies.

If such a tonnage tax is politically inadvisable, present tax statutes should be revised to include valuation standards and methods similar to those adopted in computing depletion for Federal Income Tax purposes.<sup>170</sup> Arbitrary administrative selection of valuation groupings and subgroupings could be avoided by a well-drafted uniform accounting and reporting statute to supplement the ad valorem and occupation tax valuations. In drafting such statutes special care should be used to avoid extraterritorial factors in the various valuation methods made available for administrative selection. The Lake Erie price should be eliminated in favor of actual sale prices of iron ore or the costs used for internal bookkeeping of the integrated enterprises. The administration of these revised valuation statutes should be supervised by the courts using a rapid statutory appeal procedure, available to construe the valuation statutes and to obtain uniform application thereof. Valuation decisions involving principles and properties once litigated should be regarded as *res judicata* under similar tax statutes as to the matters litigated and binding on the Commissioners of Taxation, the BTA, and courts alike.<sup>171</sup>

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170. Compare U. S. Treas. Reg. 111, 29.23 (m) *et seq.* See notes 88-95 *supra*.

171. The doctrine of collateral estoppel has been neglected by the BTA and Commissioner in successive tax years. Compare notes 161-165 *supra*; Report, *supra* note 4, at 153; Restatement, Judgments, § 70, comment b (1934) (collateral estoppel applies to questions of law and matters adjudicated in one property tax judgment which then cannot be raised as to the next tax levied). Cf. *New Orleans v. Citizens Bank*, 167 U. S. 371 (1897); *Deposit Bank v. Frankfort*, 191 U. S. 499 (1903); *U. S. v. Stone and Downer Co.*, 274 U. S. 225, 230 (1927) (successive federal tax judgments); see *State ex rel. Flodin v. Dist. Court Koochiching County*, 222 Minn. 546, 25 N. W.

#### IV. REMEDIES AVAILABLE FOR OVERVALUATION OR IMPROPER ASSESSMENT

##### A. Administrative Remedies

The taxpayer who is aggrieved by the initial overvaluation of his property for purposes of the ad valorem tax has a long and arduous trail through Minnesota administrative hierarchy if he must exhaust his remedies before taking court action. His first appeal is to the borough, town or city board of review<sup>172</sup> if a complaint to the supervising assessor is not successful.<sup>173</sup> The next appeal is to the county board of equalization, which has power to reduce the assessment of real or personal property but not below the aggregate value as returned by the assessors;<sup>174</sup> although the county board theoretically has power to raise the total assessment. The reduction restriction is a serious impediment to successful operation of any localized complaint procedure and as a practical matter results in reluctance to grant relief, especially in small communities where one or two industries bear the property tax burden. If he does succeed in winning agreement of the city board of equalization, the taxpayer must also obtain concurrence of the county board and the county auditor for the reduction, before the Commissioner of Taxation can recognize the revision.<sup>175</sup> At one time there was no provision for judicial review of decisions of the State Tax Commission by certiorari.<sup>176</sup> Now the commissioner of Taxa-

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2d 692 (1946) (class suit). *But cf.* *Comm'r v. Sunnen*, 333 U. S. 591, 597-602 (1948); *Johnson Lumber Co.* 12 TC (No. 51, 1949) (income tax: basis for depreciation, issue in earlier litigation distinguished); see *Scott, Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 9, 10 (1942); *Griswold*, Book Review, 48 Harv. L. Rev. 1037, 1038 (1935); Note, 46 Harv. L. Rev. 692-696 (1933); Note, 33 Col. L. Rev. 1404 (1933); 50 Harv. L. Rev. 991 (1937).

172. The Board of Review of a Borough can alter, revise, amend, equalize, or reduce an assessment as it deems proper. 1 Minn. Stat. § 274.06 (1945). Note, 15 Minn. L. Rev. 692 (1931).

173. 1 Minn. Stat. § 273.071 (1945). Now the County Supervisor of Assessments may be substituted in counties not employing a county assessor. 1 Minn. Stat. § 273.071 (1945) (§ 273.07 was repealed and the supervisor system superimposed on the assessment hierarchy by Minn. Laws 1947, c. 531, §§ 1-15.)

174. 1 Minn. Stat. § 274.13 (5) (1945).

175. 1 Minn. Stat. § 270.12 (7) (1945); *State ex rel. Foley Bros. & Kelley v. Minn. Tax Comm'n*, 103 Minn. 485, 115 N. W. 647 (1908). See *State ex rel. Interstate Air Parts v. Minneapolis-St. Paul Metropolitan Airport Comm'n*, 223 Minn. 175, 185, 25 N. W. 2d 718, 725 (1947). *But cf.* *State ex rel. City of Ely v. Minn. Tax Comm'n*, 137 Minn. 20, 162 N. W. 675 (1917).

176. *State ex rel. Brown v. Board of Public Works of Red Wing*, 134 Minn. 204, 158 N. W. 977 (1916); *State ex rel. Hennepin Holding Co. v. Minn. Tax Comm'n*, 135 Minn. 282, 160 N. W. 665 (1916) (reason given that the court could not fix the valuation which seems incorrect in view of other cases, e.g., *State v. Oliver Iron Mining Co.*, 198 Minn. 385, 270 N. W.

tion may hear appeals from the county board in his capacity as the State Board of Equalization<sup>177</sup> or under his complaint powers;<sup>178</sup> these adversary proceedings are subject to review by the State Supreme Court by statutory certiorari<sup>179</sup> on the appeal of the taxpayer or of the municipality;<sup>180</sup> the court may affirm, reverse, or remand for further proceedings. The results of such proceedings, which are primarily designed to handle complaints against assessed valuations *before* the tax is spread, are not a bar to any or all defenses the taxpayer may make in an action to collect taxes nor to the spreading of the tax,<sup>181</sup> which means the municipality or state can retain the same tax and valuation despite the proceedings. The taxpayer can be put to his proof again in an action to collect the tax, with the attendant expense and delay.

Since 1939, an additional, and perhaps mandatory, procedure has been imposed by which the valuation may be appealed to the Board of Tax Appeals<sup>182</sup> by the taxpayer, state, or municipality. Despite the continued presence in the statutes of procedure outlined above, the 1939 Reorganization Act contained provisions which have been interpreted by the BTA to give it exclusive jurisdiction over all appeals from the Commissioner.<sup>183</sup> Whether the

609 [1936]; *State v. Koochiching Realty Co.*, 146 Minn. 87, 177 N. W. 940 [1920]).

177. 1 Minn. Stat. § 270.12 (1945). See St. Paul Dispatch, Dec. 22, 1948, p. 1, for an example of the commissioner's recent exercise of this power in raising mineral valuations an average of 10%.

178. 1 Minn. Stat. § 270.11 (5) (6) (1945). Upon reducing the valuation, suitable notice must be given the municipality. 1 Minn. Stat. § 270.19 (1945). However, if the tax is increased or decreased in excess of \$100, or there is a change in the valuation which will have a like effect, the change must be approved by the Attorney General or his deputy. Ops. Att'y Gen. 130-B (Aug. 10, 1939). The opinion of the Attorney General, if requested by the Commissioner of Taxation in writing, upon any matter within the scope of the functions of the department of taxation, shall have the force and effect of law unless and until overruled by a decision of the Board of Tax Appeals or a court of competent jurisdiction. 1 Minn. Stat. § 270.09 (1945). This relation between the Commissioner of Taxation and the Attorney General in performing, essentially a judicial function, seems to raise a question of separation of powers under Minn. Const. Art. III.

179. 1 Minn. Stat. § 270.23 (1945).

180. 1 Minn. Stat. § 270.22 (1945).

181. 1 Minn. Stat. § 279.26 (1945).

182. 1 Minn. Stat. § 271.06 (1945).

183. 1 Minn. Stat. § 271.09 (1) (1945). Docket 147 Minn. B.T.A. (1944) construed this provision to apply to all orders of the Commissioner of Taxation and to equalization proceedings, denying a motion to stay the BTA proceedings while a case was pending before the state district court where taxpayer alleged overvaluation. In Docket 55a Minn. B.T.A. (1941) in discussing a motion of taxpayer to stay or dismiss the action before the B.T.A. because of district court proceedings by taxpayer on overvaluation, the Board said:

"There is thus vested in the Board a full and complete right of review and redetermination of the order of the Commissioner. Under

BTA has such exclusive jurisdiction has not yet been decided by the Minnesota Supreme Court.

The doctrine of exhaustion of administrative remedies has two aspects, one of which is quite familiar in state and local taxation, namely, that a court will not give relief in equity or refund taxes unless the taxpayer has first taken his valuation problems through available administrative channels.<sup>184</sup> The second aspect is less well recognized in taxation and has grown up in spite of express statutory provisions preserving all common law or other statutory remedies. The doctrine of "Primary Jurisdiction" is that a court cannot entertain a suit for a rebate of rates or equitable relief from administrative action where the character of the suit or action is one properly heard or entertained in the first instance by an administrative agency which may have similar jurisdiction over the subject matter of the controversy.<sup>185</sup> Thus, review by the Minnesota BTA by statute is conclusive only if the taxpayer has appealed to the board or has agreed in writing to be bound by the decision, otherwise, "all rights of action or defences in the courts of the state respecting any tax, fee or assessment *now afforded* the taxpayer by law shall be preserved."<sup>186</sup> Does this mean the procedures of appeal to the Supreme Court from the Commissioner of Taxation or State Board of Equalization now authorized by statute are still preserved?<sup>187</sup> The new statute seems expressly to contemplate a coextensive jurisdiction of at least the state district court on assessment and valuation issues.<sup>188</sup>

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section 2362-19 (a) (§ 271.10), provision is made for review of the order of this Board by the Supreme Court. These three steps—that is, the determination by the Commissioner, review by the Board, and review by the Supreme Court when all rights are exercised, constitutes in the last analysis the final determination."

184. *First National Bank of Greeley v. Weld County*, 264 U. S. 450 (1924).

185. *Texas and Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). See Note, 51 *Harv. L. Rev.* 1251 (1938).

186. 1 Minn. Stat. § 271.09 (2) (1945).

187. *Cf.* 1 Minn. Stat. §§ 270.23, 270.22, 270.26 (1945). It could be argued that the ordinary certiorari (Ch. 606) was part of the "administrative review" powers of the Supreme Court. 1 Minn. Stat. § 270.26 (1945). And that the BTA is now an optional step in that procedure, rather than a mandatory one with the added advantage (or expense) of a hearing *de novo*.

188. 1 Minn. Stat. § 271.09 (3) (1945) (provision for stay of the BTA proceeding if the issue is the same in the district court as in the BTA). But where a municipality alleges undervaluation before the BTA, and a taxpayer alleges overvaluation before the district court, the issues are not the same. Docket 55a Minn. B.T.A. (1941). And the burden of proof is on the taxpayer that the issues are the same. *Ibid.* The district court has jurisdiction to hear complaints of the taxpayer as to assessment when the equalized assessment list is returned from the commissioner of taxation, and before the tax is spread. 1 Minn. Stat. §§ 270.17, 278.01 (1945).

The primary jurisdiction rule has been imposed by Federal courts in situations where the statute was equally express in preserving existing remedies. In *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*<sup>189</sup> the statute<sup>190</sup> said "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but provisions of this act are in addition to such remedies." The question is not whether other remedies exist at law or by statute, but whether the courts will exercise self-restraint in refusing the case because the controversy is one peculiarly suited to the discretion, expertness, or procedures of the administrative agency designed to preserve uniformity.<sup>191</sup> And questions of valuation and assessment, once the standards and criteria have been determined judicially, may be held especially suited to the expertness of the Board of Tax Appeals.<sup>192</sup>

The Minnesota Court has two conflicting lines of decisions on the question of exhaustion of administrative remedies. The earlier tax cases seem to require exhaustion of administrative remedies before the taxpayer could get relief, even on questions of power to tax.<sup>193</sup> But in *State v. Koochiching Realty Co.*<sup>194</sup> in 1920 the question was overvaluation of some urban and farm lands raised as a defense to a proceeding to collect taxes. The trial court found the assessment excessive and found the true value of each tract. On appeal, the findings and new valuation by the trial court were affirmed. The court was held not to be exercising legislative or administrative functions. Permission of the county or state board of equalization was not required in absence of statutory provision for such permission. This case seems to have been followed and at other times ignored. The court there limited *In re Payment of Taxes of Pine County*<sup>195</sup> to its facts; that case had held the defense of overvaluation was not available to the taxpayer in a suit to recover unpaid taxes on timber lands since he had failed to apply to

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189. 204 U. S. 426 (1907).

190. 24 Stat. 387 (1887).

191. Cf. *Texas & Pacific Ry. v. American Tie and Timber Co.*, 234 U. S. 138 (1914). But notice the situation where the question is one of construction of the words of a localized statute or tariff, or establishment of a rule of law. *Great Northern Ry. v. Merchants Elevator Co.*, 259 U. S. 285 (1922).

192. Cf. *Village of Aurora v. Comm'r of Taxation*, 217 Minn. 64, 14 N. W. 2d 292 (1944).

193. *Clarke v. Board of Comm'rs*, 66 Minn. 304, 69 N. W. 25 (1896); *State v. Robert Holmes*, 162 Minn. 173, 202 N. W. 440 (1935). See *State ex rel. Interstate Air-Parts v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 223 Minn. 175, 185, 25 N. W. 2d 718, 725 (1947).

194. 146 Minn. 87, 177 N. W. 940 (1920).

195. 96 Minn. 392, 105 N. W. 276 (1905).

the county board for relief. However, the *Pine County Case* was "followed" in 1936 in *State ex rel. Hendrickson v. Strom*,<sup>196</sup> where the court refused mandamus to compel a county auditor to reclassify the taxpayer's property as a homestead since no facts had been presented to the assessor or county board prior to the petition. The *Strom Case* seems to point in the direction of adoption of the primary jurisdiction rule since the action demanded was peculiarly in the discretion of the administrative agency, and the petition for court action came before any administrative appeal.

If the assessment procedure prior to spreading the final tax on the county or city tax rolls involves a seven and possibly an eight step procedure<sup>197</sup> prior to exhaustion of administrative remedies, neither the primary jurisdiction rule nor the requirement of exhaustion of remedies would seem to make sense if applied judicially in Minnesota, since the procedures prior to the Board of Tax Appeals are already too cumbersome and lacking in supervision.<sup>198</sup> Instead, some legislative overhauling and simplification of the existing statutory structure seems in order. The assessment procedure should be reduced to a three step procedure: the local board, the Tax Commissioner, and to a District Court. After the decision of the county or city board, the Board of Tax Appeals could hear the case for the Commissioner, making findings similar to those made on a contested equalization or complaint. It would seem important also to have court supervision over the administrative decision, using the same district court that would hear the later petition to reduce assessment or defense in a suit to collect taxes, if indeed the actions could not be consolidated prior to spreading the tax. The Supreme Court could refuse certiorari from a district court unless a serious conflict of principles of valuation or rule of law arose between the court and the state administrative authorities.

### B. Judicial Remedies

Much already has been written showing the uncertainty of taxpayer's remedies for erroneous property tax valuations.<sup>199</sup> It will

196. 198 Minn. 173, 269 N. W. 371 (1936). See *Farmer's Bank v. Billstein*, 204 Minn. 224, 226, 283 N. W. 138, 140 (1938) (declaratory judgment law application refused; mandamus the proper remedy).

197. City or county supervisor of assessors; city board of review; county board of equalization; (possibly the county auditor); the State board of equalization; the state tax commissioner; the board of tax appeals; and the Supreme Court.

198. See 1 Minn. Stat. § 274.10 (1945). See also Minn. Resources Comm'n, *supra* note 107, at 55, 56.

199. *E.g.*, Note, 15 Minn. L. Rev. 692 (1931) (criticizing lack of judicial remedies in Minnesota); Note, *Remedies for Unequal Property*



serve for this discussion to point out that the statutory writ of certiorari has been enlarged judicially in Minnesota to include situations which involve review of judicial or quasi-judicial functions of the local board of review or county board of equalization.<sup>200</sup> Injunctive relief has not been very successful in valuation cases.<sup>201</sup> Mandamus may now lie to review discretionary administrative action, but it has had an uncertain career as a tax remedy in the Minnesota courts,<sup>202</sup> and faces the objection that there is an adequate remedy at law.<sup>203</sup>

The statutory remedies at law provided for illegal assessments, overvaluations, unfair or unequal assessment, and prior payment of real property taxes are: first, to serve copies of a petition<sup>204</sup> to the state district court on the county auditor, county treasurer and county attorney prior to the levy of the tax on June first of the year the tax becomes payable; or secondly, to raise these objections as a defense<sup>205</sup> in the action to collect delinquent real property taxes. But there is a condition precedent to the first method that the peti-

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*Valuations*, 46 Harv. L. Rev. 1000 (1933) (recommends centralized supervision and scientific assessment as a basic necessity); Note, 26 Mich. L. Rev. 922 (1928) (weakness of most extraordinary writs and equitable remedies); Note, 22 Mich. L. Rev. 594 (1924) (injunction a weak remedy except where the valuation clearly can be proved fraudulent). See Sherwood, *Mandamus to Review State Administrative Action*, 45 Mich. L. Rev. 123 (1946); McAllister, *Taxpayers Remedies—Washington Property Taxes*, 13 Wash. L. Rev. 91 (1938).

200. *State ex rel. Board of Comm'rs v. Dunn*, 86 Minn. 301, 90 N. W. 772 (1902). See Note, 27 Minn. L. Rev. 399, 400 (1943); Note, 26 Mich. L. Rev. 922, 926 (1928).

201. *State v. Haynes*, 82 Minn. 34, 84 N. W. 636 (1900); *Bradish v. Lucken*, 38 Minn. 186, 41 N. W. 138 (1888) (denial of injunctive relief in a class suit). Cf. *Schultz v. City of Mankato*, 176 Minn. 76, 222 N. W. 518 (1928) (settled that injunction will not issue to prevent assessment of taxes, there being an adequate remedy at law in the defense to an action to collect taxes).

202. *Cases where Mandamus issued*: *State ex rel. N. W. Airlines v. Comm'r of Taxation*, 208 Minn. 195, 293 N. W. 243 (1940) (discretionary function; mandamus proper to enforce duty to order a refund); *State ex rel. Town of Kratka v. County of Pennington*, 211 Minn. 569, 12 N. W. 2d 41 (1942) (where a "positive statutory duty").

203. *Fajder v. Village of Aitken*, 87 Minn. 445, 92 N. W. 332, 934 (1902); *Wall v. Borgen Auditor*, 152 Minn. 106, 188 N. W. 159 (1922); *Braddock Iron Mining Co. v. Erskine*, 155 Minn. 70, 192 N. W. 193 (1923). The exceptions are where the county board levies a tax above an amount allowed by law. 1 Minn. Stat. § 275.26 (1945); or a joint suit which would bring relief to many persons in lieu of a single suit. *Fairley v. City of Duluth*, 150 Minn. 374, 185 N. W. 390 (1921) (wheelage tax); and a void assessment where the judgment would be a cloud on title. *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468 (1874); *Sewall v. City of St. Paul*, 20 Minn. 511 (1874).

204. 1 Minn. Stat. § 278.01 (1945).

205. 1 Minn. Stat. § 279.15 (1945), the remedy most often used in the past. But if a judgment has been rendered under 1 Minn. Stat. § 278.01 (1945) on the assessment or valuation that will preclude the defense for the tax year for which rendered. 1 Minn. Stat. § 278.13 (1945).

tioner pay at least 50 per cent of the tax levied for the year,<sup>206</sup> unless it appears the property would be exempt and payment would work hardship on the petitioner. Such a petition under 1 Minn. Stat. § 278.01 (1945) is entitled to a speedy trial, and with a minimum of technicalities upon the claim, objections, or defenses made by the petitioner.<sup>207</sup> The district court has power to approve a compromise or to set a lower valuation than that set forth in the offer by the state,<sup>208</sup> and to make a refund for overpayment.<sup>209</sup> This procedure is subject to appeal to the Supreme Court<sup>210</sup> with no statutory limitations as to the finality of the district court's findings of fact, or of mixed law and fact.<sup>211</sup> Three difficulties appear in this procedure as applied to mineral valuation cases, first the cost and complexity of proof to both the taxpayer and the state under the usual rules of evidence;<sup>212</sup> secondly, absence of provisions as to the effect of the judgment as to subsequent rules of valuation selected by the Commissioner of Taxation or assessors;<sup>213</sup> and finally, its unavailability to contest personal property taxes or valuations therefor.<sup>214</sup>

Because of the refund powers of the Commissioner of Taxation, it is said that the taxpayer must exhaust administrative remedies before bringing suit to collect back real property taxes illegally or

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206. 1 Minn. Stat. § 278.03 (1945).

207. 1 Minn. Stat. § 278.05 (1945).

208. *Ibid.*

209. 1 Minn. Stat. § 278.12 (1945). This procedure seems to answer part of the objections raised to inadequacy of remedies for illegally assessed taxes in Note, 15 Minn. L. Rev. 692 (1931), but a costly trial and difficult burden of proof as to over-valuation is still entailed. Cf. *State v. Oliver Iron Mining Co.*, 198 Minn. 385, 270 N. W. 609 (1936) (record of six volumes in the District Court; 1 Minn. Stat. §§ 279.17-19 [1945]).

210. 1 Minn. Stat. § 278.13 (1945). If no appeal is taken, the judgment is final and conclusive only as to the taxes involved in the petition.

211. *Ibid.*

212. See Pierce, *Preparation of Valuation Cases*, 25 Taxes 53 (1947) (federal tax practice but valid for state tax valuation cases); Note, *Tax Problems in the Valuation of Property*, 25 Taxes 520 (1947) (also federal tax); Hamburg, *Tax Valuation of Real Estate, Stock and Good Will*, 6 Institute of Fed. Tax. 145 (1948). The Minnesota courts have been liberal in reception of expert opinion testimony and the use of statistical and economic data. Cf. *State v. Oliver Iron Mining Co.*, 198 Minn. 395, 270 N. W. 614 (1936) (statutory requirement of non-technical trial; 1 Minn. Stat. § 279.17 [1945]). But cf. *American Bauxite Co. v. Board of Equalization*, 119 Ark. 362, 177 S. W. 1151 (1915) (rejecting proof of capitalized earnings valuation); *Puget Sound Power and Light Co. v. King County*, 10 Wash. 2d 424, 116 P. 2d 827 (1941); *State v. Federal Reserve Bank*, 25 F. Supp. 14 (D.C. Minn., 1938).

213. Cf. *Village of Aurora v. Comm'r of Taxation*, 217 Minn. 64, 14 N. W. 2d 292 (1944) (involving the same properties litigated in *State v. Oliver Iron Mining Co.*, *supra* note 212, but for a different year's taxes, claiming the state had not followed the court method of valuation in the earlier case).

214. 1 Minn. Stat. § 277.02 (1945). Cf. *Land O'Lakes Creamery v. Village of Sebeka*, 225 Minn. 540, 31 N. W. 2d 660, 665 (1948).

unjustly collected.<sup>215</sup> But a suit to recover illegally assessed personal property taxes is available,<sup>216</sup> if there has been a payment under protest; however, what is a payment under protest, or under coercion, or the equivalent, must be litigated<sup>217</sup> in each case.

An established procedural method to secure more speedy relief in tax cases is an action under the Uniform Declaratory Judgments Act,<sup>218</sup> adopted by Minnesota in 1933. The proceeding is analogous to the power of the Court of Session in early Scotch law to issue special declarations and later to give special equitable relief.<sup>219</sup> The United States Supreme Court early upheld validity of use of declaratory judgments in state tax actions,<sup>220</sup> and has been followed in this respect by the Minnesota Court.<sup>221</sup> The requirements of an action for a declaratory judgment were existence of adversary interests and parties, a true justiciable issue between the parties, and that the decision rendered will settle and determine the controversy.<sup>222</sup> Relief has been afforded the taxpayer under a contention of double taxation on corporate excess of a foreign corporation as a question of power to tax.<sup>223</sup> And it has been used to obtain construction of the income tax law.<sup>224</sup> Relief has been granted under the Declaratory Judgments Act where a classification of tax was alleged unconstitutional, as an alternative remedy and not an extraordinary remedy.<sup>225</sup>

But the use of the declaratory judgment as an alternative

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215. Note, 15 Minn. L. Rev. 692 (1931). Whether this is also the case where a claim of overvaluation will be barred because of failure to exhaust administrative remedies is an open question. See notes 194 and 196 *supra*.

216. 1 Minn. Stat. § 277.04 (1945).

217. *Oakland v. County of Ramsey*, 98 Minn. 404, 108 N. W. 857 (1906); *State v. Cudahy*, 103 Minn. 419, 115 N. W. 645, 1039 (1906). See Note, 11 Va. L. Rev. 134 (1924).

218. 2 Minn. Stat. §§ 555.01-16 (1945). See Borchard, *Uniform Declaratory Judgment Act*, 18 Minn. L. Rev. 239 (1934); 19 Minn. L. Rev. 716 (1935).

219. Borchard, *Declaratory Judgments* 125-28 (2 ed. 1941).

220. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249 (1933) (state excise taxes on storage and distribution of gasoline).

221. *Reed v. Bjornson*, 191 Minn. 254, 253 N. W. 102 (1934) (income tax).

222. 2 Minn. Stat. §§ 555.11, 555.01 (1945). *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249 (1933); *County Board of Education of St. Louis County v. Borgen*, 192 Minn. 512, 257 N. W. 92 (1934) (levy and collection of taxes for schools; held not a justiciable controversy, the parties not having adversary interests).

223. *Bemis Bag Co. v. Wallace*, 197 Minn. 216, 266 N. W. 690 (1936).

224. *Hall Hardware Co. v. Gage*, 197 Minn. 619, 268 N. W. 202 (1936). The Board of Tax Appeals would seem the exclusive remedy now. *Duluth Superior Dredging Co. v. Comm'r*, 217 Minn. 346, 14 N. W. 2d 439 (1944).

225. See *Leighton v. City of Minneapolis*, 222 Minn. 516, 518, 25 N. W. 2d 263, 264 (1946).

remedy was early limited by the Minnesota Court to situations where other remedies were not well established nor working satisfactorily so that if a taxpayer had another equitable or statutory remedy that existing remedy must be used.<sup>226</sup> And in the recent case, *Land O' Lakes Dairy Co. v. Village of Sebeka*,<sup>227</sup> the Minnesota Court held that the remedy under the Declaratory Judgments Act was *not* available to contest real property tax assessments or levies, there being an adequate remedy under 1 Minn. Stat. § 278.01 (1945) to challenge the tax before levy; but that the Declaratory Judgments Act is available to contest personal property taxes, the normal statutory procedure being unsatisfactory.<sup>228</sup>

Jurisdiction of Federal Courts likewise may be precluded by the failure of the Taxpayer to exhaust state remedies before commencement of proceedings.<sup>229</sup> In determining which is the last step in the state action for which judicial review is sought, it is important to distinguish between action that is void, therefore always open to collateral attack, and action that is merely irregular or a result of honest mistake which can properly be reviewed only upon a direct appeal after the taxpayer has exhausted his state remedies.<sup>230</sup> Thus, the nature of the over-valuation, whether merely irregularities of procedures,<sup>231</sup> whether based on a wrong principle,<sup>232</sup> or whether fraudulent or deliberately discriminatory<sup>233</sup> may deter-

226. See *Farmers & Merchants Bank v. Billstein*, 204 Minn. 224, 226, 283 N. W. 138, 140 (1938).

227. 225 Minn. 540, 31 N. W. 2d 660 (1948).

228. The rather curious effect of this case on future mineral valuation controversies may be to require the mining companies to institute a separate defense for overvaluation of stock pile ore mined during months when shipping is closed, although the same valuation method is used in assessing it as for unmined ore reached by the real property tax period, and the valuation method used for a stock pile could be tested by a petition for declaratory judgment, but the valuation used for the ore in the ground would be subject to 1 Minn. Stat. § 278.01 (1945) or the uncertain administrative procedures outlined above. The result in this case also seems contrary to the trend of opinions which allow use of declaratory judgments for test of assessments of real property taxes. See Borchard, *Declaratory Judgments* 846 (2 ed. 1941); Note, 62 Harv. L. Rev. 787, 873 (1949).

229. *Greeley v. Weld County*, 264 U. S. 450 (1924); *Goldsmith v. Standard Chemical Co.* 23 F. 2d 313 (8th Cir. 1928). See 27 Mich. L. Rev. 109 (1928).

230. Stason, *Judicial Review of Tax Errors—Effects of Failure to Resort to Administrative Remedies*, 28 Mich. L. Rev. 637 (1930).

231. These normally are not open to collateral attack but must be taken by direct review after exhaustion of administrative remedies and statutory appeals.

232. No cases decide whether all administrative appeals and statutory appeals must be exhausted prior to collateral attack. Direct attack after exhaustion of state remedies seems the safer course.

233. These situations are open to collateral attack as void, so administrative appeals normally need not be exhausted. *Cummins v. Merchants National Bank*, 101 U. S. 153 (1879); *Raymond v. Chicago Traction Co.* 207 U. S. 20 (1907).

mine the point at which the case will receive judicial review in the Federal Courts, even if this is allowing the result to determine the jurisdiction.<sup>234</sup> And, the characterization of the state court's action as part of an administrative procedure or as a final legal remedy becomes important.<sup>235</sup> Probably the position of the Minnesota Supreme Court in hearing appeals from either the Commissioner of Taxation<sup>236</sup> or the Board of Tax Appeals<sup>237</sup> is as part of an administrative process; whereas in connection with objections at law to collection or assessment of taxes, the appeals are final statutory court action.<sup>238</sup>

The chief bar to original equity jurisdiction of the federal district courts over state tax matters is Section 24(1) of the Judicial Code which after 1937 provided:

"... no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such states."<sup>239</sup>

The appropriate procedure to contest constitutionality of taxing action now is resort to the highest state court and then appeal to the United States Supreme Court rather than bringing suit in the Federal District Court.<sup>240</sup> The restrictions on equitable relief in a Federal District Court have been extended to apply to actions for a declaratory judgment<sup>241</sup> under the Federal Declaratory Judgment Act,<sup>242</sup> the reason being given that the Supreme Court will pay scrupulous regard to the independence of state governments and their fiscal operations. However, federal courts have taken

234. *But cf.* operation of the Johnson Act, 50 Stat. 738 (1937); 28 U. S. C. § 41 (1) (1946), notes 240, 241 *infra*.

235. Stason, *Judicial Review of Tax Errors—Effects of Failure to Resort to Administrative Remedies*, 28 Mich. L. Rev. 637 (1930).

236. 1 Minn. Stat. § 270.26 (1945).

237. 1 Minn. Stat. § 271.10 (1945); see text to note 256 *infra*.

238. 1 Minn. Stat. § 278.13 (1945).

239. 50 Stat. 738 (1937); 28 U. S. C. § 41(1) (1946) (The Johnson Act), as amended, 62 Stat. 932, 28 U. S. C. § 1341 (Cong. Serv. 1948).

240. See *In re New York, S. & W. Ry. Co.*, 36 F. Supp. 158 (D.C. N.J. 1940). *Cf.* *Phipps v. Sch. Dist. of Pittsburgh*, 111 F. 2d 393 (3d Cir. 1940); *Baker v. Atchison, T. & S. F. Ry.*, 106 F. 2d 525 (10th Cir.), *cert. denied*, 308 U. S. 620 (1939); *Whitmore v. Bu. of Rev. of New Mexico*, 64 F. Supp. 911 (D.C. Mex.), *aff'd*, 329 U. S. 668 (1946).

241. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293 (1943); *Hillsborough Township, N. J. v. Cromwell*, 326 U. S. 621 (1946); *West Pub. Co. v. McColgan*, 138 F. 2d 320 (9th Cir. 1943). See note, 149 A. L. R. 1094, 1103 (1944); Note, 25 Minn. L. Rev. 643 (1941); Note, 50 Yale L. J. 927 (1941).

242. 48 Stat. 955 (1934), 49 Stat. 1027 (1935), 28 U. S. C. § 400 (1946), as amended, 28 U. S. C. §§ 2201, 2202 (Cong. Serv. 1948). See *Spector Motor Serv. v. McLaughlin*, 323 U. S. 101 (1944).

non-tax cases on the grounds of diversity of citizenship and the amount in controversy being more than \$3,000.<sup>243</sup>

The rigorous procedure to reach the Minnesota Supreme Court in valuation and assessment cases is not alleviated by the doubts which may arise as to the alternative remedies to be used before state courts or administrative agencies. Relief in Federal Courts, to the extent it depends on exhaustion of remedies before state tribunals, is equally perilous and unsatisfactory. The Minnesota taxpayer who undertakes a contest of mineral property tax valuations faces an arduous and costly struggle, with the consolation that if he wins in the state court he may be forced to begin all over again when the next year's tax bill is presented. But his problems are not yet ended.

### C. Judicial Review of the Minnesota Board of Tax Appeals— Administrative Finality of Tax Valuations

In reorganization of the Minnesota Department of Taxation in 1939, a board of tax appeals was created within the department, but independent of it.<sup>244</sup> The board is said to function as an administrative "clearing-house" between the department of taxation and the courts.<sup>245</sup> The reasons for its creation are said to be similar to the purposes of the federal Tax Court, namely: to relieve the taxpayer of the hardship of paying a tax before contesting the assessment, to relieve the courts of the burden of tax litigation, and to avoid overloading the Supreme Court with reviewing the mass of evidence usually submitted before an expert board dealing with technical details.<sup>246</sup>

The jurisdiction of the board is appellate, "to review and re-determine orders or decisions of the commissioner of taxation."<sup>247</sup>

243. *Pure Oil Co. v. Petrolite Corp.*, 58 F. Supp. 716 (D.C. Texas), *cert. denied*, 330 U. S. 834 (1947); *Lucas v. City of Charlotte*, 86 F. 2d 394 (4th Cir. 1936); See 109 A. L. R. 297, 300 (1937).

244. Minn. Laws 1939, c. 431, art. 6, § 10; 1 Minn. Stat. § 271.01 (1945).

245. See *Village of Aurora v. Commissioner*, 217 Minn. 64, 74, 14 N. W. 2d 292, 300 (1944). The concept of a "clearing-house" may envisage the Supreme Court as part of an administrative process of which certiorari to it is the logical conclusion. If the primary jurisdiction rule is applied this would be important in determining whether a taxpayer has exhausted his administrative remedies before appeals to a state district court under the procedure in 1 Minn. Stat. § 270.17 (1945) (appeal from assessment), or to the supreme court from the commissioner of taxation under 1 Minn. Stat. § 270.22 (1945). The *Aurora Case*, *supra*, throws doubt on the availability of either of these procedures if a municipality contests.

246. *Village of Aurora v. Commissioner*, 217 Minn. 64, 75, 14 N. W. 2d 292, 301 (1944).

247. 1 Minn. Stat. § 271.05 (1945).

An appeal from an order of the commissioner may be brought by the state's attorney-general, a taxpayer or municipality;<sup>248</sup> and each appeal is heard *de novo* upon issues made by the notice of appeal and answer; but the appealing party must meet a presumption that the order of commissioner is "prima facie" valid.<sup>249</sup> The statute sets out detailed provisions for hearings, notice pleadings, transcript of testimony, and entry of a final order giving reasons for the decision.<sup>250</sup>

Creation of the board raised immediate problems of the finality of administrative review of tax assessments. The primary question of scope of judicial review of the board's decisions the Minnesota Supreme Court considered in 1944,<sup>251</sup> holding the board has broad powers of finality of decision of both fact and law. Basing its views on the words of the statute<sup>252</sup> and *Dobson v. Commissioner*,<sup>253</sup> the court extended its earlier decisions<sup>254</sup> which had established the finality of administrative findings in the traditional area of fact. But the distinction between "fact" and "law" in property and occupation tax valuation cases and the degree to which *Dobson v. Commissioner* will be followed remain to be explored.

The reorganization statute is explicit<sup>255</sup> in its provisions for

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248. 1 Minn. Stat. § 271.06 (1) (1945). The provision for appeal by any "political subdivisions of the state, directly or indirectly interested therein or affected thereby . . ." indicates the adversary nature of the proceeding before the Minnesota Board of Tax Appeals and perhaps distinguishes it from proceedings before the federal Tax Court. This provision is found in property tax procedure of a few other states which also have a Board of Tax Appeals. Cf. N. J. Stat. Ann. § 54:2-34 (Supp. 1949) (Division of Tax Appeals hears appeals by counties and municipalities); Ohio Gen. Code Ann. §§ 1464-1 (5), 5610 (1946) (Board of Tax Appeals can hear county determinations and local officers). But see Mass. Ann. Laws c. 58A, § 6 (1945).

249. 1 Minn. Stat. § 271.11 (1945). See *State v. Trask*, 167 Minn. 304, 306, 209 N. W. 18, 19 (1926).

250. 1 Minn. Stat. §§ 271.06-.08 (1945).

251. *Village of Aurora v. Commissioner of Taxation*, 217 Minn. 64, 14 N. W. 2d 292 (1944).

252. 1 Minn. Stat. § 271.10 (1945).

253. 320 U. S. 489 (1944).

254. *State ex rel. Interstate Iron Co. v. Armson*, 166 Minn. 230, 207 N. W. 727 (1926); *Cargill, Inc. v. Spaeth*, 215 Minn. 540, 10 N. W. 2d 728 (1943) (income tax).

255. Most statutes, if they provide for state-wide administrative review of assessments, are silent on the scope of judicial review thereafter. Culp, *Administrative Remedies in the Assessment and Enforcement of State Taxes*, 17 N. C. L. Rev. 118, 130 (1939). Cf. Mass. Ann. Laws c. 58A, § 13 (1945) (procedure of review established but not the scope); N. J. Stat. Ann. § 54:4-62 (1940) (general judicial review of all tax assessments and determinations with court power to redetermine assessment. No specific review of Division of Tax Appeals); Ohio Gen. Code Ann. § 1464 (1946) (no provision for judicial review).

judicial review by the state supreme court upon writ of certiorari from any final order of the BTA.<sup>256</sup>

"Such review may be had on the ground that the board was without jurisdiction, that the order of the board was not justified by the evidence or was not in conformity with law, or that the board committed any other error of law."

At the outset the burden is on the aggrieved party to show in what particulars the order was not supported by the findings or the findings were not justified by the evidence;<sup>257</sup> there is an added presumption in tax assessment cases that the administrative findings are fair and impartial.<sup>258</sup>

In examining a statutory limitation of review of evidence the courts are apt to look to the meaning intended by the legislature and prevailing judicial interpretations of the term.<sup>259</sup> No settled definitions or judicial interpretations have been found for the words "justified by the evidence."<sup>260</sup> Decisions of the Minnesota court before establishment of the BTA show that review of administrative agencies generally,<sup>261</sup> and especially review of administrative tax valuations, in the absence of statutory requirements, embrace a wide range of evidential standards required before the court will set aside the findings: (1) a "gross" mistake in fact,<sup>262</sup> (2) whether there was "any" evidence to support the decision,<sup>263</sup> (3) a requirement of "substantial" evidence,<sup>264</sup> (4) whether the evidence was such that the agency might "reasonably make the order."<sup>265</sup>

256. 1 Minn. Stat. § 271.10 (1945).

257. 1 Minn. Stat. § 271.11 (1945). "... the order of the board of tax appeals ... shall be prima facie evidence of all facts stated therein. . . ."

258. *Ibid*: "... and shall be prima facie evidence that all precedent requirements of the law were complied with. . . ." Read with 1 Minn. Stat. § 272.06 (1945) (legality of form and substance presumed).

259. Stason, "Substantial Evidence" in *Administrative Law*, 89 U. of Pa. L. Rev. 1026 (1941).

260. "Justified, meaning done on adequate reasons sufficiently supported by credible evidence when weighed by an unprejudiced mind, guided by common sense and by correct rules of law . . .", as defined in *Selectmen of Wakefield v. Judge of First District Court of Eastern Middlesex*, 262 Mass. 477, 160 N. E. 427 (1928) (italics added) (statutory standard of judicial review of town administrative removal of police officers). If read literally, the phrase "justified by the evidence" seems to require a full examination of evidence underlying the order.

261. *State v. Great Northern Ry.*, 130 Minn. 57, 153 N. W. 247 (1915).

262. *State v. London & Northwest Am. Mortgage Co.*, 80 Minn. 277, 83 N. W. 339 (1900).

263. *State ex rel. City of Ely v. Minnesota Tax Comm'n*, 137 Minn. 20, 162 N. W. 675 (1917).

264. *State v. Great Northern Ry.*, 135 Minn. 19, 159 N. W. 1089 (1916); see Note, 23 Minn. L. Rev. 68 (1938).

265. *State ex rel. Inter-State Iron Co. v. Armson*, 166 Minn. 230, 207 N. W. 727 (1926).



Since no uniform or clear meanings can be attached to these words,<sup>266</sup> the selection of a particular standard of evidence on review becomes a problem of judicial policy.<sup>267</sup> In absence of an articulate legislative purpose in the statute or during its enactment,<sup>268</sup> the court must resort to its own notions of the relations between the administrative agency and courts.

Administrative finality has been extended in recent years in both federal and state courts by widening the pigeonhole of "fact."<sup>269</sup> The doctrine of "constitutional" or "jurisdictional" question of fact has been a controversial limitation on the exercise of a court's independent judgment on facts or on evidence behind administrative findings.<sup>270</sup> If an issue of confiscation of property is involved,<sup>271</sup> the duty of the appellate court is to exercise independent judgment on the facts presented by the record.<sup>272</sup> Tax valuations have been held confiscatory in a period of great depression and the underlying evidence opened to a constitutional fact type of examination without a showing of discrimination or lack of uniformity.<sup>273</sup> But the usual holding is that due process is not violated by giving administrative finality to determinations of value made for pur-

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266. Note, 23 Minn. L. Rev. 68 (1938).

267. Stason, "Substantial Evidence" in *Administrative Law*, 89 U. of Pa. L. Rev. 1026 (1941).

268. According to a letter from the Revisor of Statutes, State of Minnesota, no preliminary or later report was published for the Reorganization Act of 1939. The bill was drafted in the Attorney General's office from data prepared by the Minnesota Institute of Governmental Research, Inc. The act received " cursory " examination in the legislative committees since it was presented late in the session.

269. *E.g.*, *FTC v. Algoma Lumber Co.*, 291 U. S. 67 (1934); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U. S. 292 (1939); *State ex rel. Interstate Air Parts Inc. v. Metropolitan Airports Comm'n*, 223 Minn. 187, 25 N. W. 2d 718 (1947).

270. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920); *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936). *But cf.* *FPC v. Hope Natural Gas Co.*, 320 U. S. 591 (1944) (consequences of a rate order supersedes valuation as basis for judicial review). The confiscation issue is reopened again, however, in *New York v. United States*, 331 U. S. 284 (1947).

271. *But see* *St. Joseph Stock Yards v. United States*, 298 U. S. 38, 73 (1936) (Brandeis, J., concurring opinion).

272. *Ibid.*: recent rate order cases show a tendency of the United States Supreme Court to return to a closer examination of the evidence supporting administrative fact findings. *ICC v. Mechling*, 330 U. S. 567 (1947); *New York v. United States*, 331 U. S. 284 (1947). This is especially true where the commission is split as to the effect of the evidence. *See id.* at 355 (Frankfurter, J., dissenting).

273. *Great Northern Ry. v. Weeks*, 297 U. S. 135 (1936). This case has been sharply limited to its facts by later decisions and is no longer authority for the notion of "substantive" due process. But relief in federal courts from state taxing action has been rendered even more difficult under 50 Stat. 738 (1937), 28 U. S. C. § 41 (1) (1946) which deprives a federal district court of equity jurisdiction if sufficient remedy is available at law or equity in a state court. *See* note 239 *supra*.

poses of the general property tax.<sup>274</sup> Underlying this treatment of all tax assessments as "ordinary" non-reviewable fact is an assumption that the courts should limit their corrective power over the valuations of real and personal property.<sup>275</sup> The basic issue is *the degree* to which the appellate courts should avoid review on the merits of administrative orders or findings which are contested as beyond the limits of constitutional authority.<sup>276</sup>

In absence of discrimination and confiscation, state<sup>277</sup> and federal courts<sup>278</sup> may decide that an administrative determination of value is a non-reviewable finding of fact. However, this overlooks that most assessments involve the application of an uncertain and vague statutory standard of cash value or market value, *e.g.*, "All property shall be assessed at its true and full value in money."<sup>279</sup> One writer has expressed the opinion that an assessment for a property tax is "at least a mixed question of law and fact on which the taxpayer should be entitled in fairness to a thorough hearing, preferably by a tribunal other than that which made the assessment originally."<sup>280</sup> Thus, if the Minnesota Board of Tax Appeals is applying a specific administratively determined standard of valuation in a *de novo* hearing in which it can raise, lower, or affirm the assessment, it would seem both the criteria used for valuation and their application should in fairness be at least a "mixed question" subject to review by the appellate court.<sup>281</sup> According to yet another view, the selection of factors considered by the board in its determinations of value and the weight to be attached to the various factors are purely "questions of law."<sup>282</sup> Indiscriminate lumping criteria of valuation into a non-reviewable

274. *E.g.*, Kentucky Railroad Tax Cases, 115 U. S. 321 (1885); King v. Mullins, 171 U. S. 404, 429-31 (1898); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673 (1930); Lehigh Valley Ry. v. Martin, 100 F. 2d 139 (3d Cir.), *cert. denied*, 306 U. S. 651 (1938).

275. *But see* State v. London & Northwest Am. Mortgage Co., 80 Minn. 277, 286, 83 N. W. 339, 341 (1900) (duty of courts to maintain a "substantial and effective corrective power over the valuations of real and personal property").

276. *See* St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 52 (1936).

277. Culp, *supra* note 255, at 129, 130.

278. Rowley v. Chicago & N. W. Ry., 293 U. S. 102 (1934).

279. 2 Minn. Stat. § 373.11 (1945).

280. Culp, *supra* note 255, at 118, 129. The court thereby dodges analysis of the method of valuation. Compare text to notes 140-144 *supra*.

281. *Accord*, Brown, *Fact and Law in Judicial Review*, 56 Harv. L. Rev. 899, 909-11 (1943). *Cf.* Paul, *Dobson v. Commissioner: the Strange Ways of Law and Fact*, 57 Harv. L. Rev. 753, 837, 838 (1944).

282. *See* Rep. Att'y Gen. Comm. Ad. Proc. 88 (1941); *cf.* note 289 *infra*.

category of "fact" seems an unsatisfying method, by which the review of the agency by the court is limited.

The scope of review of the Minnesota Board of Tax Appeals in property valuation cases was first established in *Village of Aurora v. Commissioner of Taxation*.<sup>283</sup> In that case the court held the selection and application of non-statutory deduction factors to arrive at net valuation of mineral properties were questions of fact, limiting itself to deciding whether evidence was such that the board might "reasonably make the order or determination in question." The court examined and rejected statutory standards of "fair, voluntary sale for cash,"<sup>284</sup> and approved an administratively determined standard of value as established by men "acquainted with the lands, their adaptability for use, and the circumstances of the surrounding community."<sup>285</sup> In effect the court extended finality of administrative findings of fact to include the selection of the criteria of valuation: "In the final analysis it was for the board to use its independent judgment, based on all the testimony, in determining the issue of undervaluation . . ." citing *Dobson v. Commissioner*.<sup>286</sup> The *Dobson* rule stated that decisions of the federal Tax Court can be reversed only if the reviewing court can identify a clear-cut mistake of law.<sup>287</sup> The reasoning of both the Minnesota court and the United States Supreme Court was founded on the presumed expertness of the BTA, and a desire to obtain uniformity of decision.<sup>288</sup> In later (1944) tax cases the Min-

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283. 217 Minn. 64, 14 N. W. 2d 292 (1944).

284. This is the vague statutory standard laid down for the valuation of mineral property. 1 Minn. Stat. §§ 273.11, 273.12 (1945).

285. *Village of Aurora v. Commissioner of Taxation*, 217 Minn. 64, 80, 14 N. W. 2d 292, 302 (1944). *But cf.* *State v. Oliver Iron Mining Co.*, 198 Minn. 385, 270 N. W. 609 (1936) (court selection of standard of valuation and deduction criteria based on expert testimony and a capitalized earnings substitute for "market value").

286. 320 U. S. 489 (1944). *Compare* *Ecker v. Western Pacific Ry.*, 318 U. S. 448, 475 (1943) (Reed, J., *Ry. reorganization valuations*). *But cf.* *Institutional Investors v. Chicago, M. St. P. & Pac. Ry.*, 318 U. S. 523, 561-564, 577 (1943) (notice the statutory valuation standards in these reorganization cases).

287. Note, 60 Harv. L. Rev. 448 (1947). See Paul, *supra* note 281 for an exhaustive analysis and criticism of this decision.

288. *Expertness*—The Minnesota BTA is called upon to decide a wider range of specialized questions than the Tax Court, and under virtually non-existent property and occupation tax statutory standard. Since its inception, the Minnesota Board has decided cases dealing chiefly with income and corporation privilege taxes, but many cases deal with such unrelated matters as procedure before the commissioner of taxation, general property tax, exemptions, listing and assessment, classification, gift taxes, inheritance taxes, sleeping car and freight line company gross earnings taxes, and miscellaneous occupation taxes. The presumption of expertness seems to be weakened also where the board is split on its findings, as it was in *Village of Aurora v. Comm'n of Taxation*, 217 Minn. 64, 14 N. W. 2d 292 (1944) (2-1). *See* New

nesota court stated that "the decision will not be disturbed if it has any reasonable basis in law,"<sup>289</sup> thus making clear its acceptance of the full extension of the *Dobson* rule.

In attempting to apply the *Dobson* rule, subsequent federal cases indicate that reviewable "questions of law" include Tax Court selection of controlling rules in tax cases in the absence of statutory standards, and the initial interpretation of statutes.<sup>290</sup> Questions of general law<sup>291</sup> and matters of procedure<sup>292</sup> are also reviewable as "law." And administrative interpretation of detailed provisions of tax statutes have been considered reviewable in many U. S. circuit courts since the *Dobson* rule.<sup>293</sup> Few circuits have gone as far as

York v. United States, 331 U. S. 284, 355 (1947) (Frankfurter, J., dissenting).

*Uniformity*—The *Dobson* rule led to confusion and uncertainty in lower courts, perhaps as a result of the peculiar structure of the Tax Court and its bifurcated review. Note, 60 Harv. L. Rev. 448 (1947); Griswold, *The Need for a Court of Tax Appeals*, 57 Harv. L. Rev. 1153, 1173 (1944). Paul, *supra* note 281, at 845-47 points out the effect of the coexistence of two administrative agencies within the same area, e.g., the Commissioner of Taxation and the BTA in the instant case. Each may arrive at a different interpretation of the statute. In property tax assessments there are not two but as many as *seven* separate agencies that may have individual interpretations of a rule. A recent study emphasizes the effect in Minnesota of having 2,600 local assessors, largely unregulated and unsupervised, on attempts at equalizing the general property tax. See Minn. Resources Comm'n, *Economic Analysis of the State of Minnesota* 55-56 (1945) (based on a study by the J. G. White Engineering Corp., N. Y.). It is submitted counsel for taxpayers and municipalities may be quite as confused by the *Aurora* rule as federal courts have been under the *Dobson* decision. It is significant that since 1944 *no* property valuation cases have been reported through the BTA to the Minnesota Supreme Court. (Period 1944 through December, 1949, inclusive.)

289. *Village of Hibbing v. Comm'r*, 217 Minn. 528, 14 N. W. 2d 923 (1944) (property tax exemption); *accord*, *Duluth-Superior Dredging Co. v. Comm'r*, 217 Minn. 346, 14 N. W. 2d 439 (1944) (income tax; follows and cites the *Aurora* case, *supra* note 288, although the latter involved quite different problems of construction of the income tax regulations). *Cf.* *Trust of Bingham v. Comm'r*, 325 U. S. 365 (1945). The situation in *John Kelley Co. v. Comm'r*, 326 U. S. 521 (1946) has not yet arisen before the Minnesota Court, although conceivably it could, originating simultaneously from the district court under 1 Minn. Stat. § 278.01 (1945) and from the BTA.

290. *E.g.*, *Trust of Bingham v. Comm'r*, 325 U. S. 365 (1945); *Beulah B. Crane v. Comm'r*, 331 U. S. 1 (1947) (Tax Court's determination that "property" means "equity" and that the amount of mortgage is not the measure of benefit realized, announced rules of general applicability on clear-cut questions of law.) (Dissent based on *Dobson* rule.); *McWilliams v. Comm'r*, 331 U. S. 694 (1947); *Comm'r v. Security-First National Bank*, 148 F. 2d 937 (9th Cir. 1945); *Comm'r v. Clarion Oil Co.*, 148 F. 2d 671 (App. D.C.), *cert. denied*, 325 U. S. 883 (1945); *Slough v. Comm'r*, 147 F. 2d 836 (6th Cir. 1945). *But cf.* *Duluth-Superior Dredging Co. v. Comm'r*, 217 Minn. 346, 14 N. W. 2d 439 (1944).

291. *McCullough v. Comm'r*, 153 F. 2d 345 (2d Cir. 1946); *Dumont's Estate v. Comm'r*, 150 F. 2d 691 (3d Cir. 1945).

292. *Maxfield v. Comm'r*, 153 F. 2d 325 (9th Cir. 1946); *Fisher v. Comm'r*, 149 F. 2d 540 (7th Cir. 1945).

293. *See* note 290 *supra*.

the Minnesota Court in holding that the reviewing court's duty is confined to deciding whether the board's interpretation of the tax statute was reasonable.<sup>294</sup> And the *Dobson* rule has caused considerable confusion in the United States Supreme Court and especially in the federal circuit courts.<sup>295</sup> The result of such agitation was a proposal in Congress to eliminate the *Dobson* rule by statutory amendment of the Internal Revenue Code.<sup>296</sup> Section 1141(a) was amended, having the effect of giving federal appellate courts the same power over Tax Court decisions as they have in review of decisions of the federal district courts, in cases tried without a jury.<sup>297</sup> This Congressional overruling of the *Dobson* decision would seem to remove the halo of Supreme Court authority from finality of BTA decisions before the Minnesota Court. It is submitted that the Minnesota Court should abandon the strict position announced in the *Aurora* case, in its place exercising discretion on each case as it comes up whether to grant certiorari, and amending the Rules of Practice<sup>298</sup> to set forth conditions under which a full review will be given as is now done for workman's compensation and labor dispute cases.<sup>299</sup>

The "law"—"fact" distinction is especially difficult to apply with any predictable accuracy,<sup>300</sup> there being no working definition of either law or fact valid even in a restricted context, about which there is reasonable certainty subsequent reviewing tribunals may agree. This is more apparent if the arbitrary classification as "fact"

294. *Kirchenbaum v. Comm'r*, 155 F. 2d 23 (2d Cir.), *cert. denied*, 329 U. S. 726 (1946); *Brooklyn National Corp. v. Comm'r*, 157 F. 2d 450 (2d Cir.), *cert. denied*, 329 U. S. 733 (1946). *Cf. Duluth-Superior Dredging Co. v. Comm'r*, 217 Minn. 346, 14 N. W. 2d 439 (1944).

295. Compare "Uniformity" note 288 *supra*.

296. Letter, Undersecretary of Treasury to the Chairman of the Ways and Means Committee, Feb. 26, 1948 (Technical Tax Revisions Recommended for 1948; Item 45 recommended elimination of the *Dobson* rule). *Magill Report* (Nov., 1947). *Cf. H. F. 340 Minnesota Legislature*, 1945; *Minn. Jud. Council Report*, Special Committee on Unification of the Courts, Item 4, p. 5, 8 (1942).

297. 48 Stat. 926, 26 U. S. C. § 1141 (a) (1946), as amended 62 Stat. 991 (1948), 26 U. S. C. § 1141 (a) (Supp. 1949). *Cf. Wright-Bernet, Inc. v. Comm'r of Internal Revenue*, 172 F. 2d 343 (6th Cir. 1949); *MacManus v. Comm'r*, 172 F. 2d 697 (6th Cir. 1949); *Comm'r v. Cardeza*, 173 F. 2d 19 (3d Cir. 1949); *Grace Bros. Inc. v. Comm'r*, 173 F. 2d 170 (9th Cir. 1949) (adopting an equity review).

298. 1 Minn. Stat. § 271.10 (2) (1945): "... and the matter shall be heard and determined by the court as in other certiorari cases, *subject to the provisions hereof and to such rules as the court may provide for cases arising hereunder.*" (Italics added).

299. Rules of Practice, Sup. Ct. of Minn., Rules III, XII (1947).

300. *Brown*, *supra* note 281, at 899, 918, 921, 926; *Paul*, *supra* note 281, at 811.

or "law" is used as a substitute for judicial analysis<sup>301</sup> on the merits of cases involving mixed law and fact.

No one rationale for justifying finality of administrative determinations is widely accepted,<sup>302</sup> by the writers or by the courts. Various theories have been proposed; *e.g.*: (1) that characterization as a non-reviewable "question of fact" is essentially a belief in the quality of expertness of the particular administrative tribunal, whereas a "question of law" is found where the appellate court decides it is equipped to handle the question.<sup>303</sup> The difficulty with this pragmatic approach is that it offers no better predictability than the traditional law-fact dichotomy.<sup>304</sup> (2) That the scope of review in state property taxation is a matter of policy of the court in absence of an effective statute.<sup>305</sup> But this leaves unexplained the important question of the reasons for determining policy. (3) That more intensive review will be given if the fact situation would lead to a decision of "general applicability."<sup>306</sup> The third seems a workable theory but formulates no basic guide for establishing the relation between courts and administrative tribunals. (4) That the judiciary cannot interfere with executive or legislative branches of government under various constitutional clauses concerning separation of powers, express or implied,<sup>307</sup> although this explanation seems to have gone out of fashion.

In absence of general agreement among courts or commentators as to the reasons justifying the "fact" or "law" distinction as an explanation of finality of administrative decisions about property value, it is submitted certain premises should be articulated by an appellate court in establishing precedents of review of administrative tax courts where the controlling review or valuation statute is silent or ambiguous. Expertness of the agency or board should be con-

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301. It has been suggested that the classification is used to allow courts more freedom to distinguish between degrees of expertness of agencies, types of action, and hard factual situations. Jaffe, *Administrative Procedure Reexamined: The Benjamin Report*, 56 Harv. L. Rev. 704, 730 (1943).

302. Expertness seems the chief ground. Paul, *supra* note 281 at 841-49. But *cf.* note 288 *supra*.

303. Landis, *The Administrative Process* 152 (1938).

304. Brown, *supra* note 281, at 922.

305. Culp, *supra* note 255, at 118, 129 (judicial review of appellate administrative tribunals).

306. Note, 60 Harv. L. Rev. 448 (1947). *Cf.* *Trust of Bingham v. Comm'r*, 325 U. S. 365, 370 (1945).

307. Note, 50 W. Va. L. Q. 75, 87 (1947); But *cf.* *State v. Minn. & Ontario Power Co.*, 121 Minn. 421, 141 N. W. 839 (1913); *State v. Koochiching Realty Co.*, 146 Minn. 87, 177 N. W. 940 (1920); *See Cooke v. Iverson*, 108 Minn. 388, 122 N. W. 251 (1909); *State ex rel. Laurisch v. Pohl*, 214 Minn. 221, 8 N. W. 2d 227 (1943) (mandamus). *See Pound, Law and the State—Jurisprudence and Politics*, 57 Harv. L. Rev. 1193, 1227-1230 (1944).

sidered in the light of the training, experience and specialized knowledge of the individual members, perhaps applying the kinds of tests used to qualify expert witnesses.<sup>308</sup> A presumption of expertness concerning income tax matters may be unconvincing<sup>309</sup> as applied to an economist's and engineer's function of mineral property valuation; thus a reviewing court's discussion of expertness should relate the expert's qualifications to the subject-matter being reviewed.

A second step in judicial analysis, it is submitted, should be an express balancing of interests between the urgency of needs of government for income, as weighed against the position of the individual taxpayer if denied effective court supervision of the selection and administration of standards of assessment and valuation. To the extent that administrative findings impliedly contain a selection of standards of valuation<sup>310</sup> there is an exercise of legislative power which, like any legislation involved in a justiciable controversy, should be subject to examination by courts on each application in a fact situation likely to reoccur in the future.<sup>311</sup>

Finally, the interests of orderly administration require judicial supervision of the degree to which standards of valuation are followed by the taxing authorities as to procedure, uniformity, and matters requiring application of general law.<sup>312</sup> However, to expect independent judicial re-determination of each finding of fact in an administrative decision applying a judicially approved standard of valuation would be to disregard fifteen years of development of the finality doctrine in both state and federal courts; it would also result in further confusion of the tax valuation procedure. It is suggested here the review of findings of the Minnesota Board of Tax Appeals should be wider than indicated by the *Aurora* case, and that 1 Minn. Stat. § 271.10 (1945) need not be amended to achieve that result.<sup>313</sup> The recent case of *Stronge & Lightener v. Commissioner*,<sup>314</sup> decided April, 1949, confirms this opinion as to income tax matters, and returns the scope of review over decisions of the BTA to a sound statutory basis.

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308. See note 288 *supra*. See A. L. I., Model Code of Evidence, Rules 402, 409 (1942).

309. Compare note 288 *supra*.

310. See note 327 *supra*.

311. Compare note 288 *supra*, with note 308.

312. This is best illustrated by the development of the *Dobson* rule in the circuit courts since that decision. Note, 60 Harv. L. Rev. 448 (1947); 26 U. S. C. § 1141(a) (Supp. 1949).

313. *Steenerson v. Great Northern Ry.*, 69 Minn. 353, 376, 72 N. W. 713 (1915). But cf. Hoshour, *Legislation Concerning the Scope of Judicial Review of Administrative Process*, 29 Minn. L. Rev. 157, 180, 185 (1945).

314. 228 Minn. 182, 36 N. W. 2d 800 (1949).

## V. CONCLUSIONS

1. The capitalized future earnings computation used for taxation of iron ore in Minnesota is a maximum valuation, having only an indirect relation to "market value" or "ordinary value," that is, what the property would bring if sold or rented. There is serious doubt as to the power of the state to include extraterritorial elements in a valuation formula used as a basis for an ad valorem tax on mineral property. The Lake Erie price, integrated transportation systems, and ore sales organizations should be excluded as factors in the Minnesota calculation. Selection of interest rates used in the Hoskold formula should reflect the cyclical nature of demands for iron ore and steel products. An adequate discounting for hazards of market and competition of foreign ores ought to be introduced to return the valuation to a local situs in terms of cash value within prescribed territorial taxing units as of the tax date.

2. Present methods of mineral taxation are thought to weaken the competitive position of undeveloped low grade ores by heavy depression property taxes and by the uncertainty of rates and administration. Capitalized future earnings valuations create an accrued tax burden on inactive and reserve properties which a small operator could not assume without excessive long-term capital investment. Consequently, the capitalized future earnings valuations and multiple taxes based on those valuations should be replaced by a single tax which levies once on the current output of the mines.<sup>315</sup>

3. If such an apportioned gross earnings or unit output tax shared with the local communities affected is not politically feasible, then a satisfactory mineral property valuation and uniform accounting statute should be adopted in place of the capitalized future earnings computations now used under ambiguous and general valuation statutes. Such a revised valuation statute could be patterned after the present Federal income tax regulations governing values used as a basis for depletion, providing adequate depletion allowances. Valuation methods used should include other factors with the capitalized future earnings calculations. Class groupings of ore properties should be eliminated in the property tax valuations to encourage any possible future small operators.

4. If neither a single current output tax nor a detailed mineral property valuation act can be adopted, then questions of valua-

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315. A constitutional amendment may be necessary as to the occupation tax. Art. IX, § 14. The legislature could, however, reduce the rate to a nominal sum and introduce a tonnage tax, achieving the same result.



tion and assessment should be placed under effective judicial supervision. The uncertainties surrounding present administrative remedies should be clarified, and a simple three-step complaint procedure made available. Thus valuations could be established by one local assessing agency with an appeal to the commissioner of taxation and board of tax appeals in one hearing, then to the same district court which would normally hear the objections to the real property tax under 1 Minn. Stat. § 278.01 (1945); and ultimately to the Supreme Court if an important question of law or law and fact is raised in the district court.

5. Decisions of the state district courts and board of tax appeals on principles of mineral valuations should be binding on other like situated property and not a decision merely as to the one year's tax bill for the properties litigated.

6. With Congressional disapproval of the *Dobson* rule, the Minnesota Court should grant a wider scope of review to the decisions of the board of tax appeals in mineral valuation cases, without amendment of present statutes, specifying the situations wherein the board is expert and the kind of conditions to surround the review.